United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,980

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

ISKA W. CARMACK, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 30, 1944.

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[fol. 1] (Notice Of Appeal.)

(Filed in U. S. District Court on August 21, 1944.)

Notice is hereby given that the plaintiff, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the final judgment or decree dismissing plaintiff's petition entered in this cause by this Court on the first day of June, 1944, upon the trial of the issue raised by plaintiff's (second) amended petition and the answer of defendant Iska W. Carmack filed thereto, by which judgment or decree it was by the Court ordered that plaintiff's (second) amended petition filed in this proceeding with leave of Court be and it is dismissed.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant,
United States Attorney.

Dated this 19th day of August, 1944.

[fol. 2] Docket entry showing filing of notice of appeal and mailing copy to attorneys for defendant.

(August 21, 1944).

Plaintiff's notice of appeal to U. S. Circuit Court of Appeals Eighth Circuit from the final judgment or decree dismissing Plaintiff's petition entered on the first day of June, 1944, upon trial of issues raised by Plaintiff's (second) amended petition and the answer of Defendant, Iska W. Carmack filed and copies of same this day mailed to Messrs. I. R. Kelso, L. L. Bowman and Homer Hall, Attorneys for Defendants.

[fol. 3] (Petition In Condemnation).

(Filed in U. S. District Court on November 22, 1941.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Docket No. 482 vs. At Law.
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and
The City of Cape Girardeau, Missouri, a Municipal Corporation; The City Council of the Said City of Cape Girardeau, Missouri; Hinkle Statler, Mayor of the City of Cape Girardeau, Missouri, a Municipal Corporation

Raymond Beckman)
Philip Steck) as members of the City Council of the City of Cape Girardeau,
Frank Batchler) Missouri, a municipal corporation

The County of Cape Girardeau in the State of Missouri, and The County Court of Said County and Harry C. Cracraft, as Presiding Judge of the County Court of said County and Fred Clippard and William F. Meier, as Judges of said County court.

The Unknown Consorts, Heirs, Devisees, Donees, Alienees Or Immediate, Mesne Or Remote, Voluntary Or Involuntary Grantees Of Each Of The Following Named Deceased Persons, Viz:

L. Lorimier
Louis Lorimier
Daniel F. Steinbeck
Victor Lorimier
Thomas S. Rodney
Thomas Jefferson Rodney
Polly Rodney
Augustus B. Lorimier
Raphael V. Lorimier

The Following Persons And Their Respective Spouses, Successors And Assignes, If Living; If Dead, Their Consorts, Heirs, Devisees, Donees, Alienees And Immediate,

Mesne Or Remote, Voluntary Or Involuntary Grantees, Whose Names And Addresses Are Unknown To Plaintiff:

Agatha Lorimier Steinbeck
Verneuil R. Lorimier
George F. Bartholomew
Louisa Fulkerson
James P. Fulkerson, husband of Louisa Fulkerson
[fol. 4] Agnes M. White
Edwin White, husband of Agnes M. White
Reuben Dowty
Polly Dowty, wife of Reuben Dowty
George Louis Steinbeck
Louisa Doroghty Steinbeck
Adeline Rebecca Steinbeck
Bartholomew C. Steinbeck
Agnes Maria Steinbeck
Thomas J. Rodney
John C. Walker
Margaret Walker
Adeline C. Dowty
Sarah L. Dowty
Samuel A. Dowty
Manning M. Kimmel
Marcellette English
Robert English, husband of Marcellette English
Steinbeck Lorimier
William A. Lorimier
Louis Lorimier
Louisa Lorimier
Margaret Lorimier
George F. Steinbeck
Manuel Lorimier

All Other Unknown Owners of all that tract of land situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, more particularly described herein; Defendants.

[fol. 5] To The Honorable, The Judges Of The United States District Court For The Eastern District Of Missouri:

Now Comes the plaintiff herein, the United States of America, a body sovereign, by its attorneys, Harry C.

Blanton, United States Attorney for the Eastern Judicial District of Missouri, and A. T. Welborn, Special Assistant to the United States Attorney, and leave of Court having been first had and obtained, filed this, its petition herein, at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the Administrator of Federal Works Agency, and would respectfully represent and show to the Court as follows:

First: This proceeding is instituted under and pursuant to the authority contained in the Third Deficiency Appropriation Act, Fiscal Year 1937, approved August 25, 1937, 50 Stat. 773; the Federal Public Buildings Appropriation Act of 1938, approved June 21, 1938, 52 Stat. 818, appropriation title "80 x 1006.4214 Construction of Public Buildings, Public Buildings Administration, Act August 25, 1937"; and the Reorganization Act of 1939, in accordance with the provisions of which Plan Numbered I was submitted to the Congress on April 25, 1939, and was made effective on July 1, 1939, by Joint Resolution approved June 7, 1939, (Public Resolution No. 20—76th Congress) authorizes the acquisition when necessary, by purchase, condemnation, exchange, or otherwise of sites and additional for emergency construction of public building projects outside the District of Columbia; and pursuant to the authority contained in the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257) and the Act of February 28, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258 (a) to 258 (e), for the condemnation of the land hereinafter described and any leaseholds and other interests therein, together with the improvements thereon, except the Library building which is reserved by the proponent.

[fol. 6] Second: It is necessary for the plaintiff, the United States of America, to acquire the land hereinafter described for a public use, viz: as a site for the construction and erection of a United States Post Office and Custom House in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri;

Third: That the Acting Administrator of Federal Works Agency, acting under the authority vested in him by the Acts of Congress aforesaid, has determined and is of the opinion that it is necessary and advantageous to

the plaintiff to acquire an estate in fee simple absolute in and to the land hereinafter described, subject only to easements and reservations as set out in the description, for the purpose aforesaid, by condemnation under judicial process, and has made application to the Attorney General of the United States to cause such proceeding to be commenced, in pursuance of which application the Attorney General has instructed and directed the institution of this proceeding;

Fourth: The land sought to be condemned herein has been duly selected as the new Post Office and Custom House and Court House site, and is located at and within the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and within the Southeastern Division of the Eastern Judicial District of the State of Missouri, and within the jurisdiction of this Court and is more particularly described as follows:

Lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri: Beginning at a point in the easterly line of Lorimier Street which point is distant 100 feet northwardly from the intersection of the easterly line of Lorimier Street with the center line of Themis Street extended eastwardly; running thence South 82 degrees 59 minutes East, on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point; thence south 6 degrees 58 minutes West on a line parallel with the easterly line of Lorimier Street a distance of 280 feet to a point; thence North 82 degrees 59 minutes West on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point in the easterly line [fol. 7] of Lorimier Street; thence North 6 degrees 58 minutes East along the Easterly line of Lorimier Street a distance of 280 feet to the point or plat of beginning; together with the improvements thereon except the Library Building;

Fifth: That said land is more definitely described and located by a blueprint or plat market "Plaintiff's Exhibit A", attached hereto and filed herewith with the Clerk of the United States District Court in and for the Eastern Judicial District, Southeastern Division of this Court;

Sixth: That funds are available to pay any award or awards which may be rendered in this proceeding for the condemnation of said land;

Seventh: That the estate and interest taken for said public use, and herein sought to be condemned, is the full fee simple absolute title in and to said land, subject only to the exception of the Library Building, as set out in the above description of said land;

Eighth: That any and all persons, firms and corporations, who have or may claim to have any interest therein as owners, lienors, leaseholders or any right, title, estate, interest, claim or lien in, to or upon the said land sought to be acquired in this proceeding, in so far as the plaintiff has any knowledge, information or belief, are as follows:

1. The City of Cape Girardeau, Missouri, a Municipal Corporation, is the apparent record owner of the fee simple title in and to said real estate, and the said City of Cape Girardeau, Missouri, as well as Hinkle Statler, its Mayor, Raymond Beckman, Philip Steck and Frank Batchler, as members of the City Council of the said City of Cape Girardeau, Missouri, are made parties defendant herein;

[fol. 8] The County of Cape Girardeau in the State of Missouri, may claim some interest in said land and said County, the County Court of said County and Harry C. Cracraft, as Presiding of the County Court of said County and Fred Clippard and William F. Meier, as Judges of the County Court of said County are made defendants herein;

[fol. 9] 2. The Unknown Consorts, Heirs, Devisees, Donees, Alienees or immediate, [nesne] or remote, voluntary or involuntary grantees of each of the following named deceased persons, viz: of L. Lorimier, Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier, Thomas S. Rodney, Thomas Jefferson Rodney, Polly Rodney, Augustus B. Lorimier, and Raphael V. Lorimier; the names of any and all of said Consorts, Heirs, Devisees, Donees, Alienees or immediate, mesne or remote, voluntary or involuntary grantees of each and all of said deceased persons are unknown to plaintiff, and for that reason cannot be inserted in the petition, and so far as plaintiff has knowl-

edge they may claim to have some right, title or estate in and to said land under a quit-claim deed dated September 11, 1820 filed for record September 12, 1820 and recorded in the land records of Cape Girardeau County, Missouri, in Book "E" at page 496, being a deed by the heirs and legal representatives of Louis Lorimier, deceased, viz: Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier, Thomas S. Rodney, Thomas Jefferson Rodney, and Polly Rodney, to the inhabitants of the Town of Cape Girardeau, collectively and plaintiff alleges that under said deed the fee simple title to said lands is vested in the City of Cape Girardeau, plaintiff further states that said unknown persons may make some claim under said quit-claim deed or otherwise to the said lands;

3. The following persons and their respective spouses, successors, and assigns, if living; if dead, their consorts, heirs, devisees, donees, alienees and immediate, [nesne] or remote, voluntary or involuntary grantees, whose names and addresses are unknown to plaintiff, may claim some right, title, interest, lien or estate in, to or upon said land, the extent, nature, quality, quantity and proportion of which is unknown to plaintiff; the place of residence of [fol. 10] any of said persons, if they be living, is unknown to plaintiff:

Agatha Lorimier Steinbeck
Verneuil R. Lorimier
George F. Bartholomew
Louisa Fulkerson
James P. Fulkerson, husband of Louisa Fulkerson
Agnes M. White
Edwin White, husband of Agnes M. White
Reuben Dowty
Polly Dowty, wife of Reuben Dowty
George Louis Steinbeck
Louisa Doroghty Steinbeck
Adeline Rebecca Steinbeck
Bartholomew C. Steinbeck
Agnes Maria Steinbeck
Thomas J. Rodney
John C. Walker
Margaret Walker

Adeline C. Dowty
Sarah L. Dowty
Samuel A. Dowty
Manning M. Kimmel
Marcellette English
Robert English, husband of Marcellette English
Steinbeck Lorimier
William A. Lorimier
Louis Lorimier
Louisa Lorimier
Margaret Lorimier
George F. Steinbeck
Manuel Lorimier

[fol. 11] 4. Each, any and all other persons, firms and corporations, and Unknown Owners, who have or may claim to have any ownership, right, title or interest in or to the said land, or who may claim to be entitled to compensation for the taking thereof, are made parties defendant herein, to the end that they may be notified of this proceeding in accordance with the law in such cases made and provided, and that they may be thus given an opportunity to appear in Court, assert their claims, be heard thereon, and have their rights, if any, finally determined and adjudicated in this proceeding;

5. That adjacent to the said land described in this petition are streets, walks and highways, and the defendants herein named, as the owners of the fee of said property herein sought to be condemned, may claim a reversionary interest in and to the premises, respectively, so occupied by streets, walks and highways, and which reversionary interest as to any and all of the land described in this petition the plaintiff herein seeks to include and condemn in this proceeding;

Wherefore, the premises considered, and to the end that all and singular the land described in this petition and hereby sought to be taken, may be acquired by the United States of America by condemnation, in accordance with the several statutes and Acts of Congress in such cases made and provided, in absolute fee simple, free and clear, and discharged from all liens, encumbrances, servitudes,

charges, restrictions and convenants whatsoever, the petition prays this Honorable Court:

1. To cite the owners and other persons interested in the land described in this petition to appear in this Court at a time to be fixed by the Court to answer this petition;

2. To appoint three disinterested freeholders, residents of Cape Girardeau County, Missouri, as Commissioners or a jury, to assess the value of said property in accordance with the laws and the statutes in such cases made and provided, and to assess and award damages for [fol. 12] the taking of said land by condemnation, and that the Court prescribe the compensation of such commissioners;

3. To take such action and pass such orders, decrees and judgments as may be necessary or proper, fully to effect the objects for which the aforesaid Acts of Congress were passed, and cause the land described in this petition to be condemned and taken by the United States of America and the absolute and unqualified title in fee simple therein, free from all liens, encumbrances, charges, servitudes, restrictions and covenants whatsoever, to vest in the United States of America, in the event that upon confirmation of the report of the Commissioners or the verdict of the jury herein, the plaintiff herein (if it thinks the public interest requires it and believes the value fixed by Commissioners or said jury to be reasonable and satisfactory to it) shall cause payment to be made according to the award of the Commissioners and the judgments of this Honorable Court into the Registry of the Court;

4. To grant all such other and further relief as the nature of the case may require.

Respectfully submitted,

UNITED STATES OF AMERICA,
By Harry C. Blanton,
United States Attorney.

Special Assistant To The
United States Attorney.

[fol. 13] United States Of America,
Eastern District Of Missouri—ss.:

Before me, the undersigned, personally appeared, Harry C. Blanton, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; and that this proceeding is in good faith for the purposes specified in the petition.

HARRY C. BLANTON.

Subscribed and sworn to before me, this ... day of November, 1941.

Clerk of U. S. District Court in and for the Eastern District of Missouri.

By ..... Deputy.

[fol. 14] (Answer of Defendant Iska W. Carmack to Amended Petition in Condemnation.)

(Filed in U. S. District Court on February 16, 1942.)

Now on this day comes defendant, Iska W. Carmack, with leave of Court by her attorney, and re-enters her appearance and files a separate answer to plaintiff's amended petition as a defendant in the above entitled cause, and states that she is one of the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, Thomas Jefferson Rodney, mentioned in the caption and in paragraph seven of plaintiff's amended petition, all of whom are also mentioned in the Order of Publication made and filed in the above entitled cause, and admits that she claims an interest in the real estate sought to be condemned. This defendant also re-enters her appearance as a defendant or interpleader for herself and other heirs similarly situated because she is an inhabitant, a citizen and tax payer of the County of Cape Girardeau and of the Town (now City) of Cape Girardeau, Missouri, and is the owner of lots in and near said Town (now City) of Cape Girardeau, Missouri.

II.

For answer to the First paragraph of plaintiff's amended petition, this defendant states that she is without knowledge or information sufficient to form a belief or opinion as to the truth, and, therefore denies the allegations in said paragraph and asks that the Court require proof thereof. Defendant, however, especially denies that [fol. 15] it is necessary to acquire the property, sought to be condemned, for an emergency construction of a public building project as alleged in said First paragraph, of plaintiff's amended petition.

III.

For answer to the statement in the First paragraph in plaintiff's amended petition that pursuant to authority the proceeding is brought to condemn the property described in plaintiff's amended petition, "except the Library building which is reserved by the proponent," this defendant asserts that such an attempt to condemn land underneath a building, without also including said building would make that part of the land covered by the Public Library building worthless and unusuable for the purposes mentioned in paragraph 2 of plaintiff's amended petition, and would make the Library useless unless permission would be granted to the public by plaintiff to approach and enter said Library building over other property belonging to plaintiff, wherefore this defendant prays that this condemnation proceeding be dismissed because of the intolerable situation that would arise with reference to the Library building and the ground upon which it is located.

IV

For answer to Second paragraph of Plaintiff's amended petition, this defendant denies the allegations therein, that it is necessary for the United States of America to acquire the land sought to be condemned for public use as a site for the erection of a Post Office and Custom House building for the reason that there is already in existence a Post Office building owned by the United States and is now being used for the same purpose, and also because there is much private property in the same or other

neighborhoods available so that it is not necessary to condemn Public Property.

V.

In reply to the Third and Fourth paragraphs of plaintiff's amended petition, this defendant states that while it is true that the Acting Administrator of the Federal Works Agency may select the land sought to be condemned for the new Post Office and Custom House site, said selec- [fol. 16] tion if made, was not properly done for the following reasons:

1. Said Acting Administrator of the Federal Works Agency acted without reasonable regard for the interests of the City of Cape Girardeau, a municipal Corporation, it being one of the political units of the State of Missouri.

2. This defendant also states that said Acting Administrator also acted arbitrarily and his determination to select said property for a new Post Office site was made without investigations or without reference to the information which an investigation disclosed.

3. This defendant also alleges in reply to said Fourth paragraph, that said site described in plaintiff's amended petition was selected in support of an attempt to sell, trade or exchange said property by the officials of the City of Cape Girardeau to the United States, without the knowledge or information of said Acting Administrator that the Mayor and City Commissioners of the City of Cape Girardeau had no legal authority or right to sell, trade, convey or exchange said property to anyone, or to violate the conditions and considerations set out in the deed made by Louis Lorimier (now deceased) to the Commissioners and Assessors in behalf of and for the use of the "District of Cape Girardeau" 4 acres including the land sought to be condemned by the proceedings in this case, said deed being dated July 29th, 1807, and recorded in Book "B" at page 15 of the Land Records of Cape Girardeau County, Missouri, a copy of which deed is hereunto attached and marked Exhibit "B".

4. This defendant further answering, states that said Acting Administrator's determination as to the site for

the new Post Office building is unsupported by evidence that said determination was made free and independent of the attempt, without authority to trade or sell said property to plaintiff for a new Post Office site with the understanding and agreement that the officials for the City of Cape Girardeau would buy the present existing Post Office site and building in Cape Girardeau, Missouri, and for this reason the determination of said Acting Administrator of Federal Works Agency had no jurisdiction to authorize the Attorney General of the United States to [fol. 17] start this condemnation proceeding in support of said illegal transaction. Wherefore this defendant having fully answered prays that this condemnation proceeding be dismissed.

VI.

In reply to the Sixth paragraph of plaintiff's amended petition this defendant denies that any funds are available to pay any award or awards which may be rendered in this condemnation proceedings against the land described in plaintiff's amended petition because all funds of the United States have been ordered by the proper officials withdrawn from being spent on any non-defense projects of which the Cape Girardeau new Post Office building is one, and all available monies other than for civil maintenance have been ordered to be spent for defense purposes only.

VII.

This defendant further answering states that the property sought to be condemned with buildings thereon and described in plaintiff's amended petition is now being used for public purposes including the use of it by the County of Cape Girardeau as a court house for the use of a court of record, to-wit: The Cape Girardeau Court of Common Pleas, of Cape Girardeau County, Missouri, and is also used by the City of Cape Girardeau, Missouri, as a City Hall for the purpose of carrying on the business of the City of Cape Girardeau, a city with a population of approximately 20,000 people; and part of said property and a building thereon is now being used as a Public Library by the inhabitants of the City of Cape Girardeau, and is also being used by the inhabitants of the City of Cape

Girardeau as a Public Park, and recreation center thus making said property, with the improvements thereon, public property of very much more importance and more necessary to the people and inhabitants of the City and County of Cape Girardeau, Missouri, than the use of same for a Post Office or Custom House building. That because this suit is an attempt unnecessarily to change said public property from one public use of greater importance to the inhabitants of the City of Cape Girardeau to another public [fol. 18] use of less importance, this defendant therefore, prays the court that said condemnation proceedings be dismissed.

VIII.

This defendant states that this proceeding purporting to be instituted into for the purpose of condemning the property described in plaintiff's amended petition, is not in good faith an attempt to condemn property, but that it is in fact a suit to quiet title to said property under the guise of a condemnation proceeding pursuant to a proposed agreement to exchange property as set out in ordinance Number 905 entitled

"Commission Form Ordinance No. 905

An ordinance authorizing and directing the Mayor of the City of Cape Girardeau, Missouri, to execute an offer to the United States of America to exchange certain property owned by the City of Cape Girardeau for property owned by the United States of America in the City of Cape Girardeau, Missouri, and authorizing the Mayor to execute such instruments as may be necessary to consummate the exchange of said property should said offer be accepted."

passed and approved the 11th day of February, 1941, a copy of which ordinance is hereunto attached and marked "Exhibit A", and made a part hereof to the same extent as if this said ordinance was here set out in full. Wherefore this defendant prays that judgment be rendered against plaintiff in this cause.

IX.

This defendant in further answer to said Third and Fourth paragraphs of plaintiff's amended petition denies

that there was ever any investigation made as to the necessity of locating the Post Office building in the City Court House Park by the engineers and architects investigating the matter of a proper site. They failed to consider the City plan in existence at the time and theretofore adopted and passed as a zoning and city plan ordinance No. 566 on the 25th day of April, 1929, said ordinance being known as the "Bartholomew Plan" which has been followed by the City of Cape Girardeau since its adoption, and the said Acting Administrator of Public Works Agency was not informed as he should have been that because of said Ordinance No. 566 that Mayor Hinkle Statler of the City of Cape Girardeau, Missouri, and Raymond Beckman, Phillip Steck and Frank Batchler, City Commissioners of [fol. 19] the City, did not have authority to dispose of said Court House Park. This defendant states that it was necessary and proper for the Government to investigate all of the facts, including the "Bartholomew Plan".

Defendant further alleges that she is informed and believes and states the fact to be: That the investigator, engineers and architects representing the Department of Public Works Agency found that the present post office site upon which is located the present Post Office building together with a lot right immediately east of it which could be readily acquired by the Government from Herman Bremermann, was the proper place for the location of the new Federal building. The exchange of property proposed by the Mayor and City Commissioners and accepted by the Federal Government ignores entirely the question of investigation necessary to determine the proper location of the Federal Building.

That the "Bartholomew Plan" was never called to the attention of the Acting Administrator of Public Works Agency in making the investigation prior to the date of his filing said report notwithstanding the fact that the said Acting Administrator as representative of the Department of the Public Works Agency, discussed the city property for exchange with the said Mayor and Commissioners, that had said investigation necessary under the law, been made by the representatives of the department they would have found that the location is in violation of said "Bartholomew Plan" and contrary to the policy which has been

pursued by the city since the adoption of said plan and would have found that said plan contemplates a civic center which would provide the proper location thereon for said building on property available to the city. That such an investigation would have developed that the present Post Office building and the lot right east thereof, was found by the investigators of the Government to be the proper place to locate the proposed Post Office and Court Building.

X.

Further answering plaintiff's amended petition this defendant denies that the deed referred to in the Seventh paragraph subdivision 2, dated September 11th, 1830, and recorded in Book E at page 496 of the Land Records of [fol. 20] Cape Girardeau County, Missouri, conveyed any title whatever to the defendant herein, City of Cape Girardeau, Missouri, of the land sought to be condemned and described in plaintiff's petition.

Further answering this defendant says that said property was deeded by the owner, Louis Lorimier, to the Commissioners and Assessors in and for the District of Cape Girardeau in behalf and for the use of the said District in trust for the purpose of having the Seat of Justice of said District permanently fixed on said land and other conditions therein set out and which includes the land herein sought to be condemned by plaintiff's amended petition. Said deed is dated July 29th, 1807, and is recorded in Book B at page 15 of the Land Records of Cape Girardeau County, Missouri, a copy of which is hereunto attached and marked Exhibit "B", and is made a part of Defendant's answer to Plaintiff's Amended Petition. This defendant states that said deed was made as a gift to the Commissioners and Assessors in trust for the District of Cape Girardeau in the Territory of Louisiana, pursuant to an agreement by and between said Louis Lorimier and the inhabitants of the said District of Cape Girardeau, and in compliance with all of the [recitials] set out in said deed of July 29th, 1807. Said property has ever since the date of said deed been held in trust and maintained as a Seat of Justice by the erection of a Court House on said property which includes the property sought to be condemned. This

defendant alleges that she is a direct heir of Louis Lorimier, deceased, and that said property under the provisions of said deed was not intended by said Louis Lorimier to be used as a Post Office or a Custom House, therefore, if said property is condemned for the purposes mentioned in plaintiff's amended petition, it will be in violation of the provisions in said deed, and that because of such violation, the title thereto would revert to this defendant and the other heirs of Louis Lorimier, deceased. That if a change in the use of said property be brought about by selling, trading, condemnation or otherwise the said real estate or proceeds received therefrom will revert back to the grantor, or the heirs of the said Louis Lorimier, the grantor in said deed of which this defendant, Iska W. Carmack is a direct heir.

[fol. 21]

XI.

Wherefore this defendant, having fully answered, prays that the condemnation proceedings in this cause be dismissed or that this defendant and those in similar relationships to Louis Lorimier and similar circumstances be allowed payment for the full value of her and their interest in and to said property and for her costs, and for whatever other orders that to the court shall seem just and proper.

L. L. BOWMAN,
Attorney for Defendant,
Iska W. Carmack.

United States of America,
Eastern District of Missouri.—ss.:

Before me, the undersigned, personally appeared, L. L. Bowman, Attorney for Defendant, Iska W. Carmack, and made oath in due form of law that the matters and facts set forth in the foregoing answer are true to the best of his knowledge, information and belief; and that this proceeding is in good faith for the purposes specified in the answer.

L. L. BOWMAN.

Subscribed and sworn to before me, this 16th day of February, 1942.

JAMES J. O'CONNOR,
Clerk of U. S. District Court in and for the Eastern District of Missouri.

By .....
Deputy.

[fol. 22] (Exhibit A.)

Commission Form Ordinance
No. 905

An ordinance authorizing and directing the Mayor of the City of Cape Girardeau, Missouri to execute an offer to the United States of America to exchange certain property owned by the City of Cape Girardeau for property owned by the United States of America in the City of Cape Girardeau, Missouri, and authorizing the Mayor to execute such instruments as may be necessary to consummate the exchange of said property should said offer be accepted.

Whereas, on July 15, 1940 the Council of the City of Cape Girardeau authorized and directed the Mayor and City Clerk to execute an offer to exchange property with the United States of America, and

Whereas, after negotiations between the City and the United States of America, the United States of America indicated that it would accept the offer to exchange properties as submitted by the City of Cape Girardeau, and

Whereas, on the 4th day of December, 1940, a Resolution was passed and adopted by the City Council of Cape Girardeau authorizing the Mayor to submit a formal offer to exchange properties with the United States of America, which offer was transmitted to the United States of America, and

Whereas, the City Council was thereafter advised that said offer could not be accepted due to an executive order issued by the Bureau of the Budget of the United of America, pursuant to a proclamation by the President of the United States, and

Whereas, having been advised that said exchange could not be effected, the City Council did, on the 7th day of December, 1940, reseind said Resolution passed on the 4th day of December, 1940, and

Whereas, the City of Cape Girardeau has not been advised that there is a likelihood that the City can secure the $430,000 Post Office and Federal Court building for the City of Cape Girardeau upon the renewal of said offer to exchange property, and

Whereas, the Council is now fully informed and deems it to be to the best interest of the City and in furtherance of the general welfare thereof to renew said offer to exchange property whereby the City is to convey a parcel of the property now owned by the City to the United States of America for the purpose of constructing thereon a Post Office and Federal Court building, and to accept in exchange therefor the parcel of land and building thereon now owned by the United States of America, and used [fol. 23] as the present Post Office and Federal Court building.

Now, Therefore, Be It Ordained By The Council Of The City Of Cape Girardeau, Missouri, As Follows:

Section 1: That the Mayor and City Clerk be authorized and directed to execute for and in behalf of the City of Cape Girardeau an offer to convey to the United States of America the following described parcel of land, to-wit:

A tract of ground in the City and County of Cape Girardeau, Missouri, described as follows: Begin at a point on the east line of Lorimier Street, said point being 100.0 feet north of the intersection of the east line of Lorimier Street and the center line of Themis Street extended; thence South 82° 59′ E., and parallel to the center line of Themis Street extended, 240.0 feet; thence south 6° 58′ W., and parallel to the east line of Lorimier Street 280.0 feet; thence North 82° 59′ W., and parallel to the center line of Themis Street extended, 240.0 feet to the east line of Lorimier Street; thence North 6° 58′ E., along the east line of Lorimier Street 280.0 feet to the point of beginning.

Section 2: The conveyance of said property shall be for the purpose of having constructed thereon by the United States of America a Post Office and Federal Court building.

Section 3: That in exchange therefor and in consideration for the conveyance by the City, the United States of America shall convey title to and the City of Cape Girardeau shall accept the following described parcel of land and building thereon now owned by the United States of America, to-wit:

Begin at the southeast corner of the intersection of Broadway and Fountain Streets in the City of Cape Girardeau, and measure along the South side of Broadway Street 125 feet and five inches; thence south, parallel with east line of Fountain Street 165.175 feet to an alley; thence west along the north side of said alley 125 feet and five inches to the est line of Fountain Street; thence north along the east line of Fountain Street 165.175 feet to place of beginning, all located in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri

Section 4: That said property to be accepted by the City of Cape Girardeau from the United States of America shall be for the uses and purposes of the Ci y of Cape Girardeau, Missouri, and the County of Cape Girardeau, Missouri for the Common Pleas Court, the City of Cape Girardeau, however, to hold title in fee simple.

Section 5: The Mayor and City Clerk are hereby directed to make and file an application with the United States of America to continue the use of the building now being used for library purposes upon the payment of a monthly rental therefor of One Dollar ($1.00) per month for such period of time as may be consistent with the policy and requirements of the United States of America.

Section 6: In the event the above authorized offer is accepted by the United States of America, the Mayor and City Clerk are hereby authorized and directed to execute such instruments as may be necessary to consummate and complete the exchange of said property for the purpose aforesaid.

Passed and approved this 11th day of February, 1941.

HINKLE STATLER,
Mayor.

Attest: W. C. KAEMPFER,
City Clerk.

[fol. 24] Exhibit B

Louis Lorimier)
) Deed
) Dated July 29th, 1807
To the) Filed Augus 13th, 1807
District of Cape Girardeau) Book B Page 15

Territory of Louisiana)
)SCt
District of Cape Girardeau)

Whereas on the 13th day of January 1806 in my proposals for having the Seat of Justice of this District permanently fixed on my Land at this place I have promised & agreed to convey four Acres of Land to the District for the purpose of erecting the public Building thereon in consiquence whereof and of the acceptation of the Court the said four acres have been laid off in a place and in a manner approved of by the Commissioners appointed for that purpose and public buildings (viz. a Court House and Prison have been erected on the same,, Therefore in compliance with the part of my said proposals and at the request of the Present Board of Commissioners and Assessors in and for the District aforesaid I do hereby give grant alien convey and confirm unto the said Commissioners and assessors in behalf and for the use of the District of Cape Girardeau the aforesaid four acres of Land situate in this Town of Cape Girardeau bounded on the East by Spanish Street on the West by Lorimier Street and divided into two equal Parts by Themis 18 Street each Moiety having three hundred and Seventy Six feet three Inches in in length (East & West) by two hundred and thirty one feet Six inches and a half in breadth the said four acres of Land so given to be and remain forever Common and public and never to be appropriated to private use, agreeably to the explisit inten-

tion of the Donor: Under which limitations & conditions above expressed,, I for myself and my Heirs the said four acres of Land and all their appurtenances I do presently covey and deliver unto the Said Commissioners & Assessors in behalf of the District forever in fee Simple and the Same I for myself my Heirs & unto them and their Successors in office under the Stipulations aforesaid,, against the Claim of all persons claiming from by or under me and of all persons whatever do hereby warrant & will forever defend —

[fol. 25] In Testimony Whereof I have hereunto Set my Hand and seal at Cape Girardeau this twenty ninth day of July in the year of Our Lord one thousand eight hundred & Seven

B. Cousin L. Lorimier (Seal)
(test)

District of Cape Girardeau Set

This day Bartholomew Cousin personally appeared before me a Justice of the Court of Common Pleas of the district aforesaid and made Oath that Louis Lorimier Signed Sealed & acknowledged the foregoing deed of conveyance in his presence——

Given under my hand at the Town of Cape Girardeau in the Said District this 29th day of July in the year 1807

Christe Hays (ls)

[fol. 26] (Amended Reply of Plaintiff to Amended Answer of Defendant Iska W. Carmack.)

(Filed in U. S. District Court on February 16, 1942.)

Plaintiff for amended reply filed with leave of Court to the amended answer filed in this cause by Iska W. Carmack, pleads as follows:

It denies each and every allegation in said answer set out or any knowledge or information sufficient to form a belief thereon.

For further reply to the first sentence of Paragraph I of said [anser], it denies that Iska W. Carmack is one of

the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, and prays the Court to compel the said Iska W. Carmack to make strict proof of said alleged facts.

To the second sentence of Paragraph I of said amended [anser], plaintiff states that said sentence alleges no facts sufficient to show that said Iska W. Carmack has any right or capacity to be a defendant herein or to set up the said alleged defenses set out in said [anser], and plaintiff alleges that said Iska W. Carmack has no such right or capacity to be a defendant in this cause or to set up such alleged defenses.

[fol. 27] Further replying to Paragraph X of said amended answer, plaintiff denies that said Iska W. Carmack has any right, title or interest in or to the land described in the petition and denies that there is any reverter in the deed mentioned in said Paragraph X dated September 11, 1830, and plaintiff prays the Court to first determine in this cause whether the said Iska W. Carmack has any title or interest in or to said lands and any right or capacity to be a defendant herein, or to set up the alleged defenses to plaintiff's petition set out in the said amended answer filed by Iska W. Carmack, and to find and adjudge that said Iska W. Carmack has no such title or interest and has no right or capacity to be a defendant in said cause or to set up said alleged defenses.

For reply to Paragraph VI of the said amended answer, plaintiff alleges that said Iska W. Carmack has no right, title or interest in or to the lands described in the petition, and has no right or capacity to raise the objection to the condemnation set out in said paragraph of the petition.

Plaintiff further alleges that said Paragraph VI of the said amended answer does not state facts constituting a defense to the cause of action for condemnation set out in plaintiff's petition.

Further replying to Paragraphs II, III, IV and V, (including sub-paragraphs 1, 2, 3 and 4 thereof) and Paragraphs VII, VIII and IX, plaintiff alleges that said paragraphs of said amended answer undertake to set up a lack of necessity for the taking of said lands for the purpose

set out in the petition, and plaintiff further states that said lands are being taken by the United States of America in this cause in its capacity as a corporation sovereign and is being taken for a public use by the said plaintiff, United States of America under its sovereign power, and the question of the necessity for the taking of same is a legislative question to be determined by the plaintiff as such corporation sovereign or its proper officer, and such question has been determined by the proper office of the [fol. 28] United States, namely, the Acting Administrator of the Federal Works Agency, and is not open to investigation or decision by this Court in this cause.

Wherefore, plaintiff prays the Court to find and adjudge as a matter of law and of fact that no person or corporation has any right, title or interest in or to said lands except the City of Cape Girardeau, Missouri, and that plaintiff may have judgment of condemnation for said lands as set out in plaintiff's petition, together with all other proper relief as prayed in said petition.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER
& A. F. WELBORN,
Special Assistants.

[fol. 29] To: L. L. Bowman, Attorney for Iska W. Carmack: Cape Girardeau, Mo.

You are hereby notified that in said cause, plaintiff on the 16th day of February, 1942, will ask leave of the Court to file in said cause the foregoing Amended Reply to the Amended Answer of Iska W. Carmack.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER
& A. F. WELBORN,
Special Assistants

I certify that I have this day mailed a copy of the foregoing Amended Reply to the Amended Answer of Iska W. Carmack and of the foregoing notice to L. L. Bowman, Attorney for Iska W. Carmack, Cape Girardeau, Missouri, this 7th day of February, 1942.

A. F. WELBORN.

[fol. 30] (Motion of Orren Wilson on Behalf of Grand Army of the Republic, et al., to Dismiss Petition in Condemnation.)

(Filed in U. S. District Court on February 20, 1942.)

Now at this date comes your Orator, and by leave of Court first had and obtained, and on the second day of the trial of this cause and on behalf of the Grand Army of the Republic, and the Ladies [Auziliary], Sons of Union Veterans and others throughout the State of Missouri, with offices and lodge halls at 900a Broadway and Pacific Streets in the City of Cape Girardeau, Missouri, in the District of Missouri, and limits it appearance for the purpose of this pleading only, to preserve the statute in statu quo, the prime object of the organizations is to protect the Union of the United States of America, and to protect the Flag, and the good citizenship for which it stands, and as a Friend of this Court, to aid in the furtherance of justice and loyalty as Americans, and to preserve good will, moves the Court to dismiss plaintiff's petition for the following reasons, to-wit, your Orator alleges and avers:

[fol. 31] 1. There is no showing up to this time on the part of the plaintiff that it is a public necessity which augments and moves the condemnation of that part of the public park sought to be condemned and the destruction of the monuments and buildings thereon, as well as the statue of the Grand Army Soldier thereon erected by said organizations.

2. That the Cape Girardeau Court of Common Pleas, where a state court is housed and in continuous session on Friday of each week, with no provision provided by law for a state court to function.

3. There is no provision for the raising of the Grand Army monument and statue and the destruction of public property which was erected by the G.A.R. soldiers and their auxiliary.

4. That at the date of the institution of this suit our country was at peace with the world, and at this date is engaged in war with a foreign enemy, and the pleader avers that the proposed plan to destroy and raise the historic monuments thereon the property sought to be condemned was and is in sympathy with the action and in direct violation of law and good citizenship.

5. That there is no equitable reason or moral necessity for the selection of the present site as proposed and in good faith, in fact, it is in bad faith and controvertion of the exercise of proper judicial action in the proposed selection of the site for a new post office in the Court House Park wherein the property is surrounded by a public park on three sides and the dead end of Themis Street, and two blocks from Main Street, and one-half block south of Broadway, and facing on Lorimier Street, and not accessible by pedestrians or vehicles from south, east or north.

[fol. 32] Wherefore this pleader prays for remedial relief in the preserving of the [statutes] and buildings in statu quo.

ORREN WILSON,
Attorney for Pleader.

[fol. 33] (Motion of Plaintiff for Leave to File Amended Petition in Condemnation.)

(Filed in U. S. District Court on August 14, 1943.)

Comes now the United States of America by Harry C. Blanton, United States Attorney for the Eastern District of Missouri, and moves the Court for leave to file its amended petition in this cause to condemn certain real estate described therein.

Dated this 12th day of August, 1943.

HARRY C. BLANTON,
United States Attorney.

[fol. 34] (Order Granting Leave to Plaintiff to File Amended Petition in Condemnation.)

(Filed in U. S. District Court on August 14, 1943.)

On oral motion of plaintiff for leave to file the amended petition in the above designated proceedings, leave is hereby granted and the petition is ordered filed.

Dated this 12th day of August, 1943.

J. C. COLLET,
United States District Judge.

[fol. 35] (Amended Petition in Condemnation.)

(Filed in U. S. District Court on August 14, 1943.)

United States Of America, Plaintiff,
Docket No. 482 vs. At Law
Certain Land Situate In The City Of Cape Girardeau, County Of Cape Girardeau, State Of Missouri, and

The City of Cape Girardeau, Missouri, a Municipal Corporation. The City Council of the said City of Cape Girardeau, Missouri Hinkle Statler, Mayor of the City of Cape Girardeau, Missouri, a Municipal Corporation, Raymond Beckman, Philip Steck, Frank Batchler, as members of the City Council of the City of Cape Girardeau, Missouri, a Municipal corporation, The County of Cape Girardeau in the State of Missouri, and The County Court of Said County and Harry C. Craeraft, as Presiding Judge of the County Court of said County and Fred Clippard and William F. Meier, as Judges of said County Court, The Unknown Consort, Heirs, Devisees, Donees, Alienees or Immediate, Mesne or Remote. Voluntary or Involuntary Grantees of Each of the Following Named Deceased Persons, viz.:

L. Lorimier, Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier, Thomas S. Rodney, Thomas Jefferson Rodney, Polly Rodney, Augustus B. Lorimier, Raphael V. Lorimier.

The following persons and their respective spouses, successors and assignes, if living; if dead, their consorts, [fol. 36] heirs, devisees, donees, alienees and immediate,

mesne or remote, voluntary or involuntary grantees, whose names and addresses are unknown to the plaintiff: Agatha Lorimier Steinbeck, Verneuil R. Lorimier, George F. Bartholomew, Louisa Fulkerson, James P. Fulkerson, husband of Louisa Fulkerson, Agnes M. White, Edwin White, husband of Agnes M. White, Reuben Dowty, Polly Dowty, wife of Reuben Dowty, George Louis Steinbeck, Louisa Doroghty Steinbeck, Adeline Rebecca Steinbeck, Bartholomew C. Steinbeck, Agnes Maria Steinbeck, Thomas J. Rodney, John C. Walker, Margaret Walker, Adeline C. Dowty, Sarah L. Dowty, Samuel A. Dowty, Manning M. Kimmel, Marcellette English, Robert English, husband of Marcellette English, Steinbeck Lorimier, William A. Lorimier, Louis Lorimier, Louisa Lorimier, Margaret Lorimier, George F. Steinbeck, Manuel Lorimier, Iska W. Carmack, All Other Unknown Owners of all that tract of land situated in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, more particularly described herein;

To the Honorable, The Judges of the United States District Court for the Eastern District of Missouri:

Now Comes the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and M. Walker Cooper, Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its amended petition herein, at the direction and under the authority of the Attorney General of the United States pursuant to the request of the Administrator of the Federal Works Agency of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this amended petition described, which the plaintiff seeks to condemn in and by this proceeding for the public use hereinafter more particularly set out;

[fol. 37] Second: That the said real estate hereinafter described is located in Cape Girardeau County, Missouri, and within the jurisdiction of the United States District Court in and for the Southeastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized and empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Administrator of the Federal Works Agency of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in fee simple absolute the land hereinafter described and the title thereto, which real estate is located as aforesaid, and is authorized and directed to be brought by the Administrator of the Federal Works Agency of the United States pursuant to the authority contained in the Third Deficiency Appropriation Act, Fiscal Year 1937, approved August 25, 1937, 50 Stat. 773; the Federal Public Buildings Appropriation Act of 1938, approved June 21, 1938, 52 Stat. 818, appropriation title "80X1006.4214 Construction of Public Buildings, Public Buildings Administration, Act August 25, 1937"; and the Reorganization Act of 1939, in accordance with the provisions of which Plan Numbered I was submitted to the Congress on April 25, 1939, and was made effective on July 1, 1939, by Joint Resolution approved June 7, 1939 (Public Resolution No. 20—76th Congress) authorizes the acquisition when necessary, by purchase, condemnation, exchange, or otherwise of sites and additional land for emergency construction of public building projects outside the District of Columbia; and pursuant to the authority contained in the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40 Sec. 257) and the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258: a to 258 e) for the condemnation of the land hereinafter described and any leaseholds and other interests therein, together with the improvements thereon, except the Library building which is reserved for the present owner or owners thereof;

[fol. 38] Fifth: That the United States of America, the plaintiff herein, being authorized and empowered, as aforesaid, seeks to acquire by condemnation in this proceeding the land hereinafter described for a public use as a site for the construction and erection of a new United States Post

Office and Custom House Building in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri;

Sixth: That the Administrator of the Federal Works Agency of the United States of America, under regulations prescribed by him, and acting jointly with the Postmaster General of the United States of America, pursuant to existing Law (Title 40, U.S.C.A. Section 341) and pursuant to the authority contained in the Federal Building Appropriation Act, approved June 21, 1938, did select the City of Cape Girardeau in Cape Girardeau County, Missouri, for the coustruction and erection of a new United States Post Office and Custom House Building, and did select the real estate hereinafter described as the site for such new United States Post Office and Custom House Building, and that the Acting Administrator of the Federal Works Agency, acting under the authority vested in him by the Acts of Con[illegible] before mentioned, has determined and is of [illegible] that it is necessary and advantageous to the [illegible], the United States of America, to acquire an estate in fee simple absolute in and to the real estate hereinafter described, subject only to the easements and reservations specifically made and set out in the description of said real estate as said real estate is hereinafter described, for the purposes aforesaid, by condemnation under judicial process and that the said Acting Administrator of the Federal Works Agency of the United States of America has made application to the Attorney General of the United States to cause such proceedings to be commenced, and that the Attorney General of the United States has authorized, instructed and directed the institution of this proceeding;

Seventh: That the land sought to be condemned herein [fol. 39] has been duly selected, as aforesaid, as the new Post Office and Custom House site and is more particularly described as follows:

Lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri: Beginning at a point in the easterly line of Lorimier Street which point is distant 100 feet northwardly from the intersection of the easterly line of Lorimier Street with the center line of Themis

Street extended eastwardly; running thence South 82 degrees 59 minutes East, on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point; thence south 6 degrees 58 minutes West on a line parallel with the easterly line of Lorimier Street a distance of 280 feet to a point; thence North 82 degrees 59 minutes West on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point in the Easterly line of Lorimier Street; thence North 6 degrees 58 minutes East along the Easterly line of Lorimier Street a distance of 280 feet to the point or place of beginning; together with the improvements thereon except the Library Building;

Eighth: That said real estate is more definitely described and located by a blue print or plat marked "Plaintiff's Exhibit A", attached to and filed with the original petition in this cause with the Clerk of the United States District Court in and for the Southeastern Division of the Eastern Judicial District of Missouri;

Ninth: That funds are available to pay any award or [fol. 40] awards which may be rendered in this proceeding for the condemnation of said land;

Tenth: That the estate and interest taken for said public use, and herein sought to be condemned, is the full fee simple title absolute in and to said land, subject only to the exception of the Library Building, as set out in the above description of said land;

Eleventh: That any and all persons, firms and corporations, who have or may claim to have any interest therein as owners, lienors, leaseholders or any right, title, estate, interest, claim or lien in, to or upon the said land sought to be acquired in this proceeding, insofar as the plaintiff has any knowledge, information or belief, are as follows:

1. The City of Cape Girardeau, Missouri, a Municipal Corporation, is the apparent record owner of the fee simple title in and to said real estate, and the said City of Cape Girardeau, Missouri, as well as Hinkle Statler, its Mayor, Raymond Beckman, Philip Steck and Frank Batchler, as members of the City Council of the said City of Cape Girardeau, Missouri, and the said City Council are made parties defendant herein;

2. The County of Cape Girardeau in the State of Missouri, may claim some interest in said land and said County, the County Court of said County and Harry C. Cracraft, as presiding Judge of the County Court of said County and Fred Clippard and William F. Meier, as Judges of the County Court of said County are made defendants herein;

3. The Unknown Consorts, Heirs, Devisees, Donees, Alienees, or immediate mesne or remote, voluntary or involuntary grantees of each of the following named deceased persons, viz: L. Lorimier, Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier, Thomas S. Rodney, Thomas Jefferson Rodney, Polly Rodney, Augustus B. Lorimier, and Raphael V. Lorimier are unknown to plaintiff, and for that reason cannot be inserted in the amended petition and insofar as plaintiff has any knowledge they may claim to have some right, title or estate in and to said land under a quit-claim deed dated September 11, 1820 filed for record September 12, 1820 and recorded in the land records of Cape Girardeau County, [fol. 41] Missouri, in Book "E" at page 496, being a deed by the heirs and legal representatives of Louis Lorimier, deceased, viz: Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier, Thomas S. Rodney, Thomas Jefferson Rodney, and Polly Rodney, to the inhabitants of the Town of Cape Girardeau collectively and plaintiff alleges that under said deed the fee simple title to said lands is vested in the City of Cape Girardeau, Missouri; plaintiff further states that said unknown persons may make some claim under said quit-claim deed or otherwise to the said lands;

4. The following persons and their respective spouses, successors and assigns; if living, and if dead, their consorts, heirs, devisees, donees, alienees and immediate, mesne or remote, voluntary or involuntary grantees, whose names and addresses are unknown to plaintiff, may claim some right, title, interest, lien or estate in, to or upon said land, the extent, nature, quality, quantity and proportion of which is unknown to plaintiff and that the places of residence of any and all of said persons, if they be living, are unknown to plaintiff:

Agatha Lorimier Steinbeck, Verneuil R. Lorimier, George F. Bartholomew, Louisa Fulkerson, James P. Fulkerson, husband of Louisa Fulkerson, Agnes M. White, Edwin White, husband of Agnes M. White, Reuben Dowty, Polly Dowty, wife of Reuben Dowty, George Louis Steinbeck, Louisa Doroghty Steinbeck, Adeline Rebecca Steinbeck, Bartholomew C. Steinbeck, Agnes Maria Steinbeck, Thomas J. Rodney, John C. Walker, Margaret Walker, Adeline C. Dowty, Sarah L. Dowty, Samuel A. Dowty, Manning M. Kimmel, Marcellette English, Robert English, husband of Marcellette English, Steinbeck Lorimier, William A. Lorimier, Louis Lorimier, Louisa Lorimier, Margaret Lorimier, George F. Steinbeck, Manuel Lorimier.

5. The defendant Iska W. Carmack, who is a resident of the County of Cape Girardeau, in the State of Missouri, may claim some right, title, interest, lien or estate in, to or upon the said real estate, the extent, nature, quality quantity and proportion of which is unknown to plaintiff except that she claims to be a lineal descendant and direct heir of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney and Thomas Jefferson [fol. 42] Rodney, mentioned in the caption of this amended petition;

6. All and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and claimants to easements in, on, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendants, as hereinabove specifically named, if known, and if unknown, such unknown persons by the description of the "Unknown Owners" of the land herein described and to be condemned, to the end that they may come into court and by proper pleadings make known their interests and claims to said lands or to the proceeds arising therefrom;

7. That adjacent to the said land described in this amended petition are streets, walks and highways, and the defendants herein named, as the owners of the fee of said property herein sought to be condemned, may claim a reversionary interest in and to the premises, respectively, so occupied by streets, walks and highways, and which reversionary interest as to any and all of the land described in this amended petition the plaintiff herein seeks to include and condemn in this proceeding;

Wherefore, the premises considered, and to the end that all an singular the land described in this amended petition and hereby sought to be taken, may be acquired by the United States of America by condemnation, in accordance with the several statutes and Acts of Congress in such cases made and provided, in fee simple absolute, free and clear, and discharged from all liens, encumbrances, servitudes, charges, restrictions and covenants whatsoever, this petitioner prays this Honorable Court:

[fol. 43] 1. To cite the owners and other persons interested in the land described in this petition to appear in this Court at a time to be fixed by the Court to answer this amended petition;

2. To appoint three disinterested freeholders, residents of Cape Girardeau County, Missouri, as Commissioners or a jury, to assess the value of said property in accordance with the laws and the statutes in such cases made and provided, and to assess and award damages for the taking of said land by condemnation, and that the Court prescribe the compensation of such commissioners;

3. To take such action and to make and render such orders, judgments and decrees as may be necessary or proper to effect fully the objects for which the said Acts of Congress were passed and to cause the lands described in this amended petition to be condemned and appropriated by the plaintiff, the United States of America, so that the unqualified and absolute fee simple title therein, free from all liens, encumbrances, charges, servitudes, restrictions and covenants whatsoever shall vest in the plaintiff, the United States of America, upon the confirmation of the Report of the said commissioners or upon

the verdict of the jury herein and the payment of such award and so that the plaintiff, the United States of America, if the public interest requires and if the values fixed by said commissioners or said jury be reasonable and satisfactory, shall cause payment to be made in the Registry of this Court for said real estate according to the award of the Commissioners or the verdict of the jury, and the judgment of this Honorable Court;

4. To grant all such other and further relief as the nature of the case may require or to the Court may appear right, just, legal and equitable.

THE UNITED STATES OF AMERICA,

By Harry C. Blanton,
United States Attorney for the Eastern District of Missouri, 402 New Federal Building, St. Louis, Missouri.

M. WALKER COOPER,
Special Assistant to the United States Attorney.

[fol. 44] (Motion of Plaintiff for Leave to Amend Amended Petition in Condemnation.)

(Filed in U. S. District Court on September 10, 1943.)

Now Comes the United States of America, plaintiff herein, by its Atorneys, and states to the Court that since the filing of the original petition herein, Hinkle Statler, the then mayor of the City of Cape Girardeau, Missouri, a Municipal Corporation, has become a member of the Naval Forces of the United States of America, and that Raymond E. Beckman has succeeded the said Hinkle Statler as Acting Mayor of the City of Cape Girardeau, Missouri, a Municipal Corporation, and that since the filing of the original petition herein the membership of the County Court of Cape Girardeau County, Missouri has changed, that Fred Clippard, then one of the Associate Judges of the County Court of Cape Girardeau County, Missouri has

succeeded Harry C. Cracraft as Presiding Judge of the County Court of Cape Girardeau County, Missouri and that O. F. Reed has succeeded the said Fred Clippard as one of the Associate Judges of the County Court of Cape Girardeau County, Missouri;

Wherefore, plaintiff moves the Court for leave to amend its amended petition filed herein on August 14, 1943 by striking out of the caption thereof the words "Hinkle Statler, [May] of the City of Cape Girardeau, Missouri, a Municipal Corporation", and by inserting in lieu thereof "Raymond E. Beckman, Acting Mayor of the City of Cape Girardeau, Missouri, a Municipal Corporation";

[Tol. 45] By striking out of the caption thereof the words "The County of Cape Girardeau in the State of Missouri and The County Court of said County and Harry C. Cracraft, as Presiding Judge of the County Court of said County and Fred Clippard and *William F. Meier,* as Judges of said County Court", and by inserting in lieu thereof the following words "The County of Cape Girardeau in the State of Missouri and The County Court of Said County and Fred Clippard, as Presiding Judge of the County Court of said County, and O. F. Reed and William F. Meier, as Judges of said County Court";

By striking out the words "Hinkle Statler, its Mayor" as they appear in the third and fourth lines of Section 1, of paragraph Eleventh, on page five of said petition, and inserting in lieu thereof the words "Raymond E. Beckman, its Acting Mayor";

And by striking out the words "Harry C. Cracraft, as Presiding Judge of the County Court of said County and Fred Clippard and William F. Meier, as Judges of the County Court of said County", as they appear in the third and fourth lines of Section 2, of paragraph Eleventh, on the fifth page of said petition, and inserting in lieu thereof the words "Fred Clippard, as Presiding Judge of the County Court of said County and O. F. Reed and William F. Meier, as Judges of the County Court of said County", thereby making the present officers of the City of Cape Girardeau and the present Judges of the County Court of the County of Cape Girardeau parties defendant in this cause.

Dated this 9th day of September, 1943.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant.

[fol. 46] (Order Granting Leave to Plaintiff to Amend Amended Petition in Condemnation.)

(Filed in U. S. District Court on September 10, 1943.)

Upon the motion of the plaintiff filed herein, it is ordered by the Court that plaintiff be and is hereby granted leave to amend its amended petition filed herein on August 14, 1943 by striking out of the caption thereof the words "Hinkle Statler, Mayor of the City of Cape Girardeau, Missouri, a Municipal Corporation", and by inserting in lieu thereof "Raymond E. Beckman, Acting Mayor of the City of Cape Girardeau, Missouri, a Municipal Corporation";

By striking out of the caption thereof the words "The County of Cape Girardeau in the State of Missouri and The County Court of said County and Harry C. Cracraft, as Presiding Judge of the County Court of said County and Fred Clippard and William F. Meier, as Judges of said County Court", and by inserting in lieu thereof the following words "The County of Cape Girardeau in the State of Missouri and the County Court of said County and Fred Clippard, as Presiding Judge of the County Court of said County, and O. F. Reed and William F. Meier, as Judges of said County Court";

By striking out the words "Hinkle Statler, its Mayor" as they appear in the third and fourth lines of Section 1, of paragraph Eleventh, on page five of said petition, and inserting in lieu thereof the words "Raymond E. Beckman, its Acting Mayor";

[fol. 47] And by striking out the words "Harry C. Cracraft, as Presiding Judge of the County Court of said County and Fred Clippard and William F. Meier, as Judges of the County Court of said County", as they appear in the third and fourth lines of Section 2, of para-

graph Eleventh, on the fifth page of said petition, and inserting in lieu thereof the words "Fred Clippard, as Presiding Judge of the County Court of said County and O. F. Reed and William F. Meier, as Judges of the County Court of said County", thereby making the present officers of the City of Cape Girardeau and the present Judges of the County Court of the County of Cape Girardeau parties defendant in this cause.

Dated this 9th day of September, 1943.

J. C. COLLET,
United States District Judge.

[fol. 48] (Answer and Disclaimer of Defendant Cape Girardeau County, Missouri.)

(Filed in U. S. District Court on August 26, 1943.)

Now at this time comes the defendant, Cape Girardeau County, Missouri, and for its answer and disclaimer to the amended petition filed by plaintiff herein disclaims any interest in the title to the real estate described in plaintiff's petition and herein sought to be condemned.

Wherefore, Defendant, Cape Girardeau County, Missouri, prays to be discharged with its costs.

JAMES A. FINCH,
Prosecuting Attorney of Cape Girardeau County, Missouri, and Attorney for Cape Girardeau County, Missouri.

[fol. 49] State of Missouri,
County of Cape Girardeau.—ss.

James A. Finch, First being duly sworn, on his oath, deposes and says that he served copies of the disclaimer of Cape Girardeau County, Missouri, one of the defendants in the case of United States of America, Plaintiff, vs. Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and the City of Cape Girardeau, Missouri, a Municipal Corporation, et al., Defendants, Docket No. 482, pending in the United States

District Court, Eastern District of Missouri, Southeastern Division, by mailing a true and correct copy thereof to each of the following:

Mr. Harry C. Blanton, United States Attorney, New Federal Building, St. Louis, Mo. (1)	Attorney for Plaintiff
Mr. R. P. Smith, City Attorney, Cape Girardeau, Mo.	Attorney for Defendant, The City of Cape Girardeau, Mo.
Mr. L. L. Bowman, Attorney at Law, H. H. Building, Cape Girardeau, Mo.	Attorney for Defendant, Iska W. Carmack

by placing a copy of said disclaimer in an envelope addressed to each of said attorneys as above set forth and placing postage thereon and depositing in the United States Mail at Cape Girardeau, Missouri, on the 26th day of August, 1943.

JAMES A. FINCH,
Affiant.

[fol. 50] Subscribed and sworn to before me this 26th day of August, 1943.

(Seal)

VIOLA DOHOGNE,
Notary Public.

My commission expires December 27, 1946.

[fol. 51] (Answer of Defendant Iska W. Carmack to Plaintiff's (Second) Amended Petition in Condemnation.)

(Filed in U. S. District Court on February 8, 1944.)

I.

Now comes Iska W. Carmack, one of the defendants in the above entitled cause, and, leave of Court having been first obtained, filed this, her separate Answer to Plaintiff's (Second) Amended Petition in Condemnation, for herself and other similarly situated, and represents unto the Court, as follows:

(1) That said defendant, Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in paragraph Eleventh of plaintiff's said (Second) Amended Petition in condemnation, and admits that she claims an interest in the real estate sought to be condemned by plaintiff's (Second) Amended Petition in Condemnation.

(2) That said defendant, Iska W. Carmack, reenters her appearance as a defendant or interpleader in the above entitled cause, for herself and other direct heirs of Louis Lorimier similarly situated.

(3) That said defendant, Iska W. Carmack, also reenters her appearance as a defendant or interpleader for herself and others similarly situated, as an inhabitant, citizen, taxpayer, and owner of lots in and near said town (now city) of Cape Girardeau, Missouri.

[fol. 52] (4) That the said defendant, Iska W. Carmack, owns lots within the town (now city) of Cape Girardeau, Missouri, on which said defendant pays taxes;

(5) That the inhabitants, citizens, taxpayers, and lot owners in said City of Cape Girardeau, desirous of protecting and safeguarding the public buildings and grounds sought to be condemned, are so numerous that it would be impracticable for all inhabitants, citizens, taxpayers, and lot owners, or a substantial percentage of such inhabitants, citizens, taxpayers, and lot owners who have protested in writing to the City official of the said City of Cape Girardeau and to the Administrator of the Federal Works Agency of the United States against the condemnation of said property, to be brought into Court as defendants in the above entitled cause; therefore, the said defendant, Iska W. Carmack, files this Answer as a taxpayer and lot owner in said town (now city) of Cape Girardeau, Missouri (as well as in her capacity as a direct heir of said Louis Lorimier) for herself and all lot owners and taxpayers of the said town (now city) of Cape Girardeau, Missouri, similarly situated.

II.

For answer to the First paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, admits that she is the owner of, and claim an interest in and to the real estate described in plaintiff's [aid] (Second) Amended Petition in Condemnation; and denies that it is either necessary or lawful for said plaintiff to acquire said property described in plaintiff's said (Second) Amended Petition, by condemnation.

[fol. 53]

III.

For answer to the Second paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, admits that the property sought to be condemned in the above entitled cause, is located in the town (now city) of Cape Girardeau, Missouri, in the Southeastern Division of the Eastern Judicial District of Missouri; and specifically denies that said (Second) Amended Petition states facts sufficient to confer jurisdiction upon this Honorable Court to make any preliminary order or orders of any kind authorizing the acquisition of the property described in plaintiff's said (Second) Amended Petition, by condemnation; that said (Second) Amended Petition in Condemnation is inconsistent with the proceedings required by the Mandate of the United States Circuit Court of Appeals for the Eighth Circuit received, filed, and entered (together with a copy of the opinion of the said Circuit Court of Appeals in the above entitled cause) in the United States District Court, Eastern District of Missouri, on June 4, 1943, hereinafter referred to for convenience as "opinion of the Circuit Court of Appeals in the above entitled cause".

IV.

For answer to the Third paragraph of Plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the said plaintiff is authorized to acquire the lands described in plaintiff's said (Second) Amended Petition, by condemnation, and alleges that the request of the Administrator of the Federal Works Agency of the United States to file plaintiff's

(Second) Amended Petition as alleged in said paragraph Third, was a wholly arbitrary, improper, and unauthorized act of the said Administrator of the Federal Works Agency of the United States, and was, and is inconsistent with the said opinion of the Circuit Court of Appeals in the above entitled cause.

[fol. 54] V.

For answer to the Fourth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the said plaintiff is authorized to acquire the property described in plaintiff's said (Second) Amended Petition, by condemnation; and said defendant alleges that the said Administrator of the Federal Works Agency of the United States was, and is without authority to cause said (Second) Amended Petition in Condemnation to be filed in the above entitled cause; that the said Administrator of the Federal Works Agency of the United States, in requesting the Department of Justice to file said (Second) Amended Petition in Condemnation, acted arbitrarily, improperly, and inconsistent with the said opinion of the Circuit Court of Appeals in the above entitled cause; that under the facts in the above entitled cause and the law governing the procedure in this cause as found and declared by the Circuit Court of Appeals in the above entitled cause, the said Administrator of the Federal Works Agency of the United States was, and is without authority to cause the said (Second) Amended Petition in Condemnation to be filed, as aforesaid, and the Department of Justice was at the time of the filing of the said (Second) Amended Petition in Condemnation, and is now without authority to prosecute the above entitled cause under the opinion of the Circuit Court of Appeals in the above entitled cause.

For further answer to said Fourth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, states that plaintiff seeks to condemn that portion of the property described in plaintiff's said (Second) Amended Petition, upon which the Public Library building is located; that the condemnation of said land underneath said Public Library building would render that portion of the land covered by the said

Public [Libary] building, worthless and unuseable for the purposes mentioned in plaintiff's said (Second) Amended [fol. 55] Petition; that the condemnation of the real estate upon which said Library building is located, would render said Public Library building useless to the public; that under plaintiff's said (Second) Amended Petition, the acquisition of the property upon which said Public Library building is located, would leave said Public Library building without any approach or entrance to said Library building [exxept] over the property sought to be acquired by condemnation; that under plaintiff's said (Second) Amended Petition, the said City of Cape Girardeau would, at any time, upon notice from plaintiff, be compelled to tear down and remove said Public Library building from the ground upon which it is now located; that the procedure adopted by plaintiff in its said (Second) amended Petition in seeking to condemn property not required for use in the proposed project described in said (Second) Amended Petition, is arbitrary, improper, and wholly unauthorized by any law, and is without precedent in the condemnation of real estate for Government projects.

VI.

For answer to the Fifth paragraph of plaintiff's [aid] (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the United States of America, plaintiff herein, is authorized and empowered to acquire by condemnation in this proceeding, the land described in plaintiff's said (Second) Amended Petition for a public use as a site for the construction and erection of a United States Post Office and Custom House Building in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri.

[fol. 56] For further answer to said Fifth paragraph of plaintiff's said (Second) Amended Petition, this defendant, Iska W. Carmack, states:

That the property sought to be condemned in this proceeding, is now and has been for many years, devoted to public purposes as stated in the opinion of said Circuit Court of Appeals in the parts thereof herein set out; that there is much available private property, including available land adjoining the land (Post Office site) now owned

by the plaintiff, reasonably fitted as a site for the construction and erection of a new Post Office and Custom House building in the said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri; that the said Administrator of the Federal Works Agency of the United States acted arbitrarily and improperly in selecting the public property described in plaintiff's said (Second) Amended Petition, as a suitable location for the construction and erection of a new Post Office and Custom House Building in said City of Cape Girardeau, Missouri; that the filing of plaintiff's said (Second) Amended Petition herein, at the arbitrary and improper request of said Administrator of the Federal Works Agency of the United States, was and is inconsistent with the opinion of the Circuit Court of Appeals in the above entitled cause; that the said Circuit Court of Appeals, in said opinion, found the undisputed facts in the above entitled cause to be and the facts have been for many years and are now as follows:

"The property (sought to be condemned) is in the nature of a public park upon which is located a court house used by the Court of Common Pleas of Cape Girardeau County, a public library building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the [fol. 57] library building. The park upon which these structures are located is used for gatherings of the public generally, for [bank] concerts, gatherings of the Boy Scouts, and gatherings of various other groups. It is also used [a] a place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but is used for public speakings. The second story of the court house is occupied by the Common Pleas Court, a judge's chambers, and a law library for the court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the clerk of the Court of Common Pleas, the city engineer, the mayor, the city council and the city attorney. There is a basement in this building used largely for a storage place, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn all the property with the improvements [thereo], 'except the library building' ".

that said opinion of the Circuit Court of Appeals in the above entitled cause further requires said plaintiff to allege in plaintiff's said (Second) Amended Petition, that the property described in plaintiff's said (Second) Amended Petition, is the only available property reasonably fitted for the public project, and failure to secure it (the court house and public park above referred to) by condemnation, would result in the failure or destruction of a public project, namely, the construction and erection of a United States Post Office and Custom House Building in the City of Cape Girardeau, in Cape Girardeau County, Missouri.

[fol. 58] For further answer to said Fifth paragraph of plaintiff's said (Second) Amended Petition, this defendant, Iska W. Carmack, states:

That there are sites other than the public buildings and park sought to be condemned by plaintiff in its said (Second) Amended Petition, including the land (present Post Office site) now owned by plaintiff and land adjoining it, available and reasonably fitted for the public project described in plaintiff's said (Second) Amended Petition, namely, a site for the United States Post Office and Custom House Building to be constructed in said City of Cape Girardeau, Missouri.

VII.

For answer to the Sixth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the Administrator of the Federal Works Agency of the United States, selected the real estate described in plaintiff's said (Second) Amended petition as a suitable and proper location for the construction and erection of a new United States Post Office and Custom House Building, pursuant to existing law, as alleged in said paragraph Sixth of plaintiff's said (Second) Amended Petition. That defendant states that the selection of the property sought to be condemned, as aforesaid, was arbitrarily and improperly selected for the following reasons:

(1) That said Administrator of the Federal Works Agency of the United States acted without reasonable and proper regard for the interests of the public within said

City of Cape Girardeau, a municipal corporation, one of the political units of the State of Missouri.

[fol. 59] (2) That said Administrator of the Federal Works Agency of the United States also acted arbitrarily and improperly in selecting the Public Property described in plaintiff's [aid] (Second) Amended Petition as a suitable site for the construction and erection of a new Post Office and Custom House Building in said City of Cape Girardeau, Missouri, and his determination to select said property as a suitable site for the construction and erection of a new Post Office and Custom House Building in said City of Cape Girardeau, was made without reference to and contrary to the information which was disclosed by an investigation which had already been made by the duly authorized and designated Site Agent of plaintiff for the Administrator of the Federal Works Agency.

(3) That said site described in plaintiff's said (Second) Amended Petition, was arbitrarily and improperly selected by said Administrator of the Public Works Agency, in support of some sort of an understanding between said Administrator of the Federal Works Agency and the City Officials of the City of Cape Girardeau, not disclosed to the public; that this defendant is informed and believes, and states the fact to be, that the arbitrary and improper selection of said site and the request by the said Administrator of the Federal Works Agency to file plaintiff's said (Second) Amended Petition herein, are pursuant to and a part of said undisclosed illegal arrangement entered into between the said City Officials and the said Administrator of the Federal Works Agency.

(4) That said City Officials of the City of Cape Girardeau, had no legal right or authority to sell, trade, convey, or exchange said Public Property described in plaintiff's said (Second) Amended Petition, or to violate the conditions and considerations set out in the deed made by Louis [fol. 60] Lorimier (now deceased) to the Commissioners and Assessors, in behalf of and for the use of the District of Cape Girardeau, of four acres, including the land sought to be condemned by the proceedings in this case, said deed being dated July 29, 1807, and recorded in Book B at page

15 of the Land Records of Cape Girardeau County, Missouri, copy of which deed is hereto attached and marked Exhibit .....

(5) That said opinion of the Circuit Court of Appeals in the above entitled cause, in accordance with the facts then and now existing, found and declared that,

"The record shows without dispute that the property described in said (Second) Amended Petition has been devoted to public use, not alone because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose."

(6) Said City Officials of the City of Cape Girardeau, are legally obligated to maintain the property described in plaintiff's said (Second) Amended Petition, for the designated purposes for which it is now and has been for many years used by the public.

(7) Said allegations set out in said paragraph Sixth of plaintiff's said (Second) Amended Petition, are inconsistent with the law governing the procedure in this proceeding, as declared in the opinion of the Circuit Court of Appeals in the above entitled cause.

VIII.

For answer to the Seventh paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the land sought to be condemned herein, has been duly selected by the said Administrator of the Federal Works Agency of the United States, as a new Post Office and Custom House Building [fol. 61] site, and states that the action of the said Administrator [and states that the action of the said Administrator] of the Federal Works Agency in selecting said site, was arbitrary and improper under existing law as hereinabove set out.

IX.

For answer to the Eighth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, states that she has no knowledge or

information as to the accuracy of the blueprint or plat "Plaintiff's Exhibit A", attached to and filed with the original petition in the above [entitle] cause with the Clerk of the United States District Court in and for the Southeastern Division of the Eastern Judicial District of Missouri.

X.

For answer to the Ninth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that funds are available to pay any award or awards which may be rendered in this proceeding for the condemnation of said land, as alleged in said paragraph Ninth of plaintiff's said (Second) Amended Petition.

XI.

For answer to the Tenth paragraph of plaintiff's [aid] (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the said plaintiff is authorized to acquire, by condemnation, any estate or interest for public use in the property sought to be condemned, as alleged in said paragraph Tenth of plaintiff's said (Second) Amended Petition; and defendant alleges that the Administrator of the Federal Works Agency arbitrarily seeks to acquire by condemnation, property devoted to public use, contrary to and inconsistent with the information and recommendations furnished said Administrator of the Federal Works Agency by Post Office Inspector, M. J. Deutsch, as aforesaid.

[fol. 62] XII.

For further answer to plaintiff's said (Second) Amended Petition in Condemnation, this [derendant], Iska W. Carmack, alleges for herself and others similarly situated, that the right, title, or interest in or to the property sought to be condemned, and the right of said defendant, Iska W. Carmack, to appear and defend in this case, was found and declared in said opinion of the Circuit Court of Appeals in the above entitled case, to be and it is derived as follows:

"The property (sought to be condemned) is situated in the City of Cape Girardeau, County of Cape Girardeau, Missouri, and the United States seeks to condemn it as a site for a United States Post Office and Custom House. The land was originally conveyed in 1807 by its then owner, Louis Lorimier, to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the 13th day of January, 1806, to have the Seat of Justice of that district permanently fixed upon his land at that place. The deed contains provisions in the nature of conditions or limitations that the land so given should 'be and remain forever common and public, and never to be appropriated to private use, agreeably to the explicit intention of the donor.'

"In 1814, the Seat of Justice having in the meantime been removed from Cape Girardeau to Jackson, the judges of the Court of Common Pleas in form conveyed this tract [fol. 63] to the heirs of Louis Lorimier, and on September 11, 1829, all of the heirs of Louis Lorimier, deceased, conveyed the premises by quit claim deed to the inhabitants of the Town of Cape Girardeau collectively 'for their use, benefit and behoof forever.' This deed conveyed certain other property not here involved, and concluded with the following paragraph:

"'Provided always that the several tracts or parcels of land thus granted to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property.'"

XIII.

For further answer to plaintiff's (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, alleges (1) that the law applicable to the facts in this case, which facts are as found in the said opinion of the Circuit Court of Appeals in the above entitled cause, is the law of the State of Missouri as declared by the Supreme Court of Missouri in the decision hereinafter men-

tioned with respect to the power of the City of Cape Girardeau to exchange or convey the property here involved; (2) that the Supreme Court of Missouri by said decision has passed upon the deed of September 11, 1820, and held that said deed conveyed the property therein described, in trust; (3) that the City of Cape Girardeau, under said decision of the Supreme Court of Missouri, has no power to alien or convey the property involved in this proceeding; (4) that the plaintiff has no right to effectuate an [fol. 64] alleged contract with the City Officials of the City of Cape Girardeau, under the decision of the Supreme Court in the case of Board of Regents vs. Painter, 102 Mo. 464; 14 S. W. 938, for the acquisition of the property sought to be condemned, which said opinion is made a part of this paragraph of this Answer, by reference; and (5) that this proceeding purporting to be instituted for the purpose of condemning the property described in plaintiff's said (Second) Amended Petition, is not in good faith an attempt to condemn property under the law and regulations referred to and relied upon in plaintiff's said (Second) Amended Petition, but this proceeding is, in fact, an arbitrary and improper attempt to effectuate an unlawful agreement or arrangement to acquire said property under the guise of a condemnation proceeding pursuant to law.

XIV.

This defendant, Iska W. Carmack, further answering plaintiff's said (Second) Amended Petition, alleges that a full, complete, adequate, and proper investigation was made by a duly authorized Site Agent of the plaintiff, Post Office Inspector, M. J. Deutsch; that said information and recommendations contained in the report of said Post Office Inspector, M. J. Deutsch, were capriciously disregarded and arbitrarily ignored by the Administrator of the Federal Works Agency in selecting the property sought to be condemned (property devoted to public use) as a site for the construction and erection of a new Post Office and Custom House Building in said City of Cape Girardeau; that said Administrator of the Federal Works Agency arbitrarily ignored a zoning and city plan ordinance No. 566 of the City of Cape Girardeau, Missouri, known as the "Bartholomew Plan"; that because of said

ordinance No. 566, Mayor Hinkle Statler of the City of Cape Girardeau, Missouri, and Raymond E. Beckman, [fol. 65] Philip Steck, and Frank Batchelor, City Commissioners of said City of Cape Girardeau, did not have authority to enter into any agreements to dispose of said public buildings and public park sought to be condemned in this proceeding; that the said Federal Works Administrator and the said City of Cape Girardeau arbitrarily ignored said Bartholomew Plan in selecting the property sought to be condemned in this proceeding.

This defendant, Iska W. Carmack, further alleges that she is informed and [belies], and states the fact to be: that the investigators, engineers, and architects representing said Administrator of the Federal Works Agency of the United States, found that the present Post Office site upon which is located the present Post Office building, together with a lot immediately East of it, which could be readily acquired by the Government from Herman Bremermann, was the proper place for the location of the new Post Office and Custom House Building. The private arrangement or understanding between the City Officials and said Administrator of the Federal Works Agency to acquire said Public Property sought to be condemned, ignores entirely the question of investigation necessary to determine the proper location of the said new Post Office and Custom House Building. That the arbitrary and improper selection of said Public Property sought to be condemned in this proceeding, was and is in violation of said Bartholomew Plan and contrary to the policy which has been pursued by the City of Cape Girardeau since the adoption of said Plan. That any proper investigation, as contemplated and required by existing law governing this proceeding, would have developed that the [the] present Post Office Building and the lot lying immediately East thereof and adjacent thereto, was found by the investigators of the Government to be the suitable and proper place to locate the proposed new Post Office and Custom House Building.

[fol. 66] XV.

Further answering plaintiff's said (Second) Amended Petition, this defendant, Iska W. Carmack, says:

That the Public Property sought to be condemned, was deeded by the owner, Louis Lorimier, to the Commissioners and Assessors in and for the District of Cape Girardeau, in behalf and for the use of said District, in trust, for the purpose of having the Seat of Justice of said District permanently fixed on said land, and other conditions therein set out, and which includes the land herein sought to be condemned by plaintiff's said (Second) Amended Petition. Said deed is hereinabove referred to as the Deed of July 29, 1807, recorded in Book B at page 15 of the Land Records of Cape Girardeau County, Missouri. This defendant states that said deed was made as a gift to the Commissioners and Assessors, in trust, for the District of Cape Girardeau, in the Territory of Louisiana, pursuant to an agreement by and between said Louis Lorimire and the inhabitants of the said District of Cape Girardeau, and in compliance with all of the recitals set out in said deed of July 29, 1807. Said property has, ever since the date of said deed, been held, in trust, and maintained as Public Property as hereinabove described.

This defendant alleges that she is a direct heir of Louis Lorimier, deceased, and that said property sought to be condemned, under the provisions of said deed was not intended by said Louis Lorimier to be used as a site for a Post Office or Custom House; therefore, this defendant, for herself and others similarly situated as direct heirs, or as inhabitants, citizens, taxpayers, and lot owners, as aforesaid, appear as defendants herein, for the purpose of asking this Honorable Court to prevent the condemnation of said Public Property in violation of said trust created under said deed of July 29, 1807.

[fol. 67] Defendant, Iska W. Carmack, further states that in the event of a violation of the terms of said deed, the title to the property therein described will revert to this defendant and other direct heirs of Louis Lorimier, deceased; that if a change in the use of said property sought to be condemned be brought about by condemnation, or otherwise, the said Real Estate, or the proceeds received therefrom, will revert back to the Grantor or the heirs of the said Louis Lorimier, the Grantor in said deed, of which this defendant, Iska W. Carmack, is a direct heir.

XVI.

This defendant, Iska W. Carmack, for further answer to plaintiff's said (Second) Amended Petition in Condemnation, says that she is informed and believes, and states the fact to be, that the Public Property sought to be condemned is not fitted or suitable as a location for a new Post Office Building in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, for the following reasons, among others, to-wit:

(1) That said property is used for public purposes, according to the undisputed facts which are as found by the said Circuit Court of Appeals in the opinion of the said Circuit Court of Appeals in the above entitled cause and made a part of the record in this case, as aforesaid; (2) that the approach to said property sought to be condemned, from the West, is what is commonly known as a deadend street, which ends at said public property; (3) that the location of the Court House Building now on said public property, which plaintiff purposes to use as the site for the construction and erection of the said new Post Office and Custom House Building, is approximately..... feet from the West property line of the Public Property sought to be condemned in this proceeding; (4) that the approach to said Public Property from the East is a deadend street which ends at the East side of said property, a distance of approximately.....feet from the East [fol. 68] property line of said Public Property sought to be condemned in this proceeding, and it is necessary to climb approximately.....steps to reach the level of the site sought to be condemned from the East property line of said Public Property; (5) that it is approximately .....feet from said East property line of said Public Property to the East side of the said Court House Building; (6) that there are no streets adjacent to the said Court House Building on either the North or South side of said property sought to be condemned in this proceeding; (7) that the property sought to be condemned, is not suitably located or fitted for use as a new Post Office Building in said City of Cape Girardeau, Missouri; (8) that there is now available much private property suitable and fitted as a location for a new Post Office and Custom House Building in said City of Cape Girardeau, Missouri;

(9) that the public property sought to be condemned herein, was arbitrarily and improperly selected as the location for the new Post Office Building by said Administrator of the Federal Works Agency without taking into consideration the necessary facts as required by existing law and regulations governing the procedure of said Administrator of the Federal Works Agency and others charged with the duty of selecting a suitable and fitted location for a new Post Office and Custom House Building in the City of Cape Girardeau from available private property suitable and fitted for a location for the said new Post Office and Custom House Building in said City of Cape Girardeau; (10) that said Administrator of the Federal Works Agency, and others charged with the duty of selecting a suitable and fitted location, as aforesaid, without destroying public property as aforesaid, did, as the result of representations made by a small group of business men of said City of Cape Girardeau, Missouri, and because of the influence of said group, arbitrarily and improperly [select] said Public Property, contrary to and in violation of ex-[fol. 69] isting law as construed by courts of competent jurisdiction; (11) that plaintiff's said (Second) Amended Petition filed herein, is inconsistent with the opinion of the Circuit Court of Appeals filed in the above entitled cause, and made a part of the record of this Court in the above entitled cause, as aforesaid; and (12) that said opinion of the Circuit Court of Appeals in reversing and remanding the above entitled cause for further proceedings consistent with that opinion, is of such a character as to have the effect of Res Judicata as to the facts found and law declared with respect to the lack of authority of plaintiff to acquire property devoted to public use described in plaintiff's (Second) Amended Petition, as a site for the new Post Office and Custom House in Cape Girardeau, Missouri.

Wherefore, this defendant, having fully answered, prays that the condemnation proceedings in this cause be dismissed, or that in case the property described in plaintiff's said (Second) Amended Petition is condemned, then and in that case, this defendant and those in [sililar] relationship to Louis Lorimier, and similar circumstances, be allowed payment for the full value of her and their in-

terests in and to said property, and for her costs, and for whatever other orders that to the Court may seem just and proper.

L. LEE BOWMAN,
H & H Bldg.,
Cape Girardeau, Mo.

I. R. KELSO,
Offices in the First National Bank Bldg.,
Cape Girardeau, Mo.

Attorneys for Defendant,
Iska W. Carmack.

[fol. 70] Transcript of Testimony and Proceedings:

(Filed September 18, 1944)

In The District Court of the United States, Eastern District of Missouri, Southeastern Division.

Cape Girardeau, Missouri.

United States of America, Plaintiff,
No. 482 vs.
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and the City of Cape Girardeau, Missouri, a municipal corporation, and Iska W. Carmack, et al., Defendants.

Be It Remembered, that on the 18th day of April, 1944, at 9:30 A. M., this matter was called for hearing in the United States District Court in above District and Division, at Cape Girardeau, Missouri, before Hon. Rubey M. Hulen, Judge. Whereupon, the following proceedings were had:

Appearances:

For the Government: Harry C. Blanton, Esq.; M. Walker Cooper, Esq.

For Defendants: I. R. Kelso, Esq.; L. L. Bowman, Esq.; Homer Hall, Esq.

[fol. 71] Proceedings:

Mr. Hall: Your Honor: Subject to the objections that heretofore have been presented to the Court on behalf of the defendant Iska W. Carmack in her representative capacity and without waiving our objection to the facts alleged in the motion and demurrer for judgment on the pleadings, and believing that the petition in this case fails to state a cause of action under the decision of the United States Circuit Court of Appeals, on the appeal of this case, we are ready to proceed.

The Court: Proceed.

Whereupon, the Government to sustain the issues in its behalf, offered and presented the following evidence:

Mr. Cooper: I first desire to offer in evidence a letter from John N. Edy, Acting Administrator of the Public Works Administration, to the Attorney-General, dated September 25, 1941, duly certified by J. Edgar Williams, Acting Head of Lands Division of the Attorney-General's office.

The Court: This is from the Acting Public Works Administrator?

Mr. Cooper: Yes, sir.

Mr. Kelso: The defendant objects to the introduction into the testimony in this proceeding of this finding and request of John N. Edy because it is alleged in the petition [fol. 72] that the proceeding as now brought under the second amended petition is based upon a finding and request made by the Postmaster-General and the Administrator of Public Works Agency acting jointly, and this paper is no authority for the institution of this proceeding under the second amended petition, which is not based upon the findings and statements made by Mr. Edy in the case which was tried and reversed.

And the further objection to the introduction is that the plaintiff has offered no testimony to show that John N. Edy was authorized to make this finding, or any facts to show that he acted in any official capacity required by the Statutes under which this proceeding has been instituted.

The Court: Objection will be overruled at this time.

Mr. Kelso: Shall we save our exceptions each time?

The Court: It is perfectly agreeable to try the case as far as exceptions are concerned, under the new rules.

Mr. Cooper: We will stipulate that the record may show that exceptions are saved to any adverse ruling by the Court as far as either party is concerned.

The Court: Very well, proceed with that understanding.

Mr. Cooper: This letter reads as follows, Your Honor.

The Court: Is that marked as an exhibit?

Mr. Cooper: Yes, sir; I will have it marked "Government's Exhibit 1." (The letter is marked as requested.)

[fol. 73] Mr. Cooper: We now read in evidence letter from John N. Edy, Acting Administrator, dated September 25, 1941, and marked by the reporter "United States Exhibit 1."

[fol. 74] (United States Exhibit 1—4/18/44 AP.)

United States of America

Department of Justice

Qui Pro Domina Justitia Sequitur

October 16, 1941.

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I hereby certify that the annexed paper is a true copy of the original record in this Department of a letter dated September 25, 1941, from the Acting Administrator of the Federal Works Agency to the Attorney General, requesting the institution of a proceeding to condemn land for a post office and custom house site at Cape Girardeau, Missouri.

Seal Department of Justice Qui Pro Domina Justitia Sequitur

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

J. EDWARD WILLIAMS,
Acting Head, Lands Division.

[fol. 75]

Cape Girardeau, Missouri
Post Office and Custom House (New)

In reply please
quote: L-McC.

Sep. 25, 1941.

My dear Mr. Attorney General:

The Third Deficiency Appropriation Act, Fiscal Year 1937, approved August 25, 1937, 50 Stat. 773; the Federal Public Buildings Appropriation Act of 1938, approved June 21, 1938, 52 Stat. 818, appropriation title "80X1006-4214 Construction of Public Buildings, Public Buildings Administration, Act August 25, 1937"; and the Reorganization Act of 1939, in accordance with the provisions of which Plan Numbered I was submitted to the Congress on April 25, 1939, and was made effective on July 1, 1939, by Joint Resolution approved June 7, 1939 (Public Resolution No. 20—76th Congress) authorizes the acquisition when necessary, by purchase, condemnation, exchange, or otherwise of sites and additional land for emergency construction of public building projects outside the District of Columbia. Under authority of the above cited legislation this Agency entered into a contract with the City of Cape Girardeau, Missouri, for the exchange of the present Federal building and site, hereinafter described, for a tract of land as a new Post Office and Custom House site also hereinafter described.

The land to be acquired by the United States is described as follows:

Lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri: Beginning at a point in the easterly line of Lorimier Street which point is distant 100 feet northwardly from the intersection of the easterly line of Lorimier Street with the center line of Themis Street extended eastwardly; running thence South 82 degrees 59 minutes East, on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point; thence South 6 degrees 58 minutes West on a line parallel with the easterly line of Lorimier Street a distance of 280 feet to a point; thence North 82 degrees 59 minutes West on a line parallel with the center line of Themis Street

extended, a distance of 240 feet to a point in the easterly [fol. 76] line of Lorimier Street; thence North 6 degrees 58 minutes East along the easterly line of Lorimier Street a distance of 280 feet to the point or place of beginning; together with the improvements thereon except the Library building.

The description of the present building site is as follows:

Lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri: Fronting 125.41 feet on the southerly side of Broadway Street and extending of that width in a southwardly direction along the easterly side of Fountain Street a distance of 165.175 feet to the northerly side of a 9 foot alley; being the same premises acquired by the United States November 19, 1907, in condemnation proceedings instituted in the Circuit Court of the United States for the Southeastern Division, Judicial District of Missouri, and designated as Case No. 19 in the records of said court.

The land sought to be acquired by the United States is understood to be owned by the City of Cape Girardeau, Missouri. This Agency has endeavored, without success, to acquire title to the land by voluntary conveyance.

I am of the opinion that it is necessary and advantageous to the interests of the government that condemnation proceedings be instituted for the acquisition of the land in question. I have the honor, therefore, to request that you cause the necessary proceedings to be instituted pursuant to the authority contained in the Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, Sec. 257) and the Act of February 26, 1931, 46 Stat. 1421 (U. S. C. Title 40, Secs. 258 (a) to 258 (e)), for the condemnation of the aforesaid land and any leaseholds and other interests therein, together with the improvements thereon, except the Library building which is reserved by the proponent.

Will you please cause to be submitted to this Agency for consideration—before confirmation of any award—a statement showing separately the damages proposed to be allowed for land, buildings, leasehold and other interests; also the expiration of any such leasehold interests.

Also, will you please advise this Agency when submitting such itemized statement within what time such award must be confirmed.

[fol. 77] Copy of site agent's report and copies of the proposal are herewith enclosed. Please call the attention of the United States Attorney to the fact that the information contained in the site agent's report is confidential.

Sincerely,

JOHN N. EDY,
Acting Administrator.

The Honorable,
The Attorney General of the United States.

McC:ge:mbw SA-Morris McKee FM-F Doyle Reynolds Johnstone.

[fol. 78] Mr. Cooper: Now that is certified on October 16, 1941, pursuant to Title 28, Section 661 U.S. Code. "I hereby certify the annexed paper is an original record."

The Court: I do not think that is necessary.

Mr. Cooper: No, I do not think so.

Mr. Kelso: At this point, Your Honor, I think it is proper to renew our objection to the reception of this certificate in evidence for the reason that it is contrary to the findings and declarations of law in the Circuit Court of Appeals in this case, and which they particularly passed upon this very document that is now offered in evidence, and the Court said.

The Court: I am acquainted with the opinion.

Mr. Kelso: I want the record to show that the Court said that the Statute authorizing the Administrator of the Federal Works Agency to acquire sites for public buildings specifically provided that insofar as relates to buildings to be used in whole or in part for post office purposes, the Secretary of the Treasury under regulations to be prescribed by him shall act jointly with the Postmaster-General in the selection of towns or sites in which buildings are to be constructed, and selection of sites therein. And further states that the allegations of the petition are

not aided by the evidence. In the letter of the Administrator to the Attorney-General, that is the one just read, "It is sought under authority of above cited legislation [fol. 79] that the Agency enter into a contract with the City of Cape Girardeau," etc. So far as appears from this letter the Postmaster-General had nothing whatever to do with any agreement to trade the Government's post office and custom house site in the City of Cape Girardeau for the property involved in this proceeding.

Mr. Cooper: We will get to that just a little later, Your Honor. We can't do everything at once.

The Court: Proceed.

Mr. Cooper: Now I desire to offer in evidence a photostatic copy, duly certified, of the site proposal offer made by the City of Cape Girardeau to exchange property.

The Court: What do you call that?

Mr. Cooper: It is really headed "Site Proposal", Your Honor, and passed by the Board. I will have this marked, Site Proposal, marked "Government's Exhibit 2". (The document is marked as requested)

Mr. Kelso: We object to the introduction of this alleged proposal to exchange the Court House and other property, devoted to public use, for the present post office site and building. And as grounds for this objection, the petition, amended petition, fails to allege any fact with reference to any exchange of property or offer to exchange property. And in the next place the petition fails to allege any fact showing that the City was authorized to [fol. 80] convey the property now sought to be condemned. The petition shows upon its face that the plaintiff and the City are relying upon a deed of the Lorimier heirs in 1820 to make the exchange. The Supreme Court of the State of Missouri passed upon this identical deed in the ..... case and said that the City acquired no title in fee, and held further that the only interest or right that the City had in the property sought to be condemned was that of a trustee, and that they, as the Federal Court held in this case, were obligated to carry out the

terms of the dedication, and that there is no evidence, I mean there is no allegation contained in any paragraph of the amended petition which shows or alleges in any way that the City acquired any right or has any right; and until they show that they have some authority, which we say on the face of the petition renders this document incompetent because of the findings of the Supreme Court of Missouri, and further because of the findings and the judgments of the Court of Appeals in this proceeding.

And further, that the document described as a proposal, which the plaintiff now seeks to offer in evidence, shows that the property sought to be condemned is a property devoted to other public use, and there is no allegation in the petition that it is necessary to acquire or condemn this property devoted to another public use, unless it appears [fol. 81] from the petition and the evidence in support thereof that the property described in this proposal is the only available property suitable and fitted for a post office site in Cape Girardeau, and that a failure to secure this public property or this property already devoted to another public use would result in the failure of the project, namely, the selection of a site for the construction of a new post office and custom house in Cape Girardeau. And further, that before it is competent under the pleadings — I mean under the opinion of the Circuit Court of Appeals, it is necessary for the plaintiff to show in the pleadings and by the evidence that there is no other property in the City of Cape Girardeau fitted and suitable as a site for the new post office and custom house; and that none of these things have appeared in the pleadings in this case. And up to this time, of course, there is no attempt to offer any evidence, and none could be offered because there is no allegation contained in the petition authorizing such proof.

The Court: May I make this comment? This trial is before the Court. Counsel is well aware about admitting testimony. I do not want to keep Counsel from making any record, but certainly there should be some limit to objections. And may I suggest that Counsel make their objections and make their record by confining their objections to the testimony. I have heard arguments in this case from Counsel twice, and I think I understand the issues. I have read the opinion. And with that information

[fol. 82] may I suggest that Counsel try to confine their remarks and objections to the testimony, and they will have opportunity later to argue this case. Try to avoid arguing the case during objections. Objection overruled. Proceed.

Mr. Kelso: I apologize to the Court.

The Court: You haven't anything to apologize for.

Mr. Kelso: I am very anxious that the opinion of the Circuit Court of Appeals be stressed in the record and therefore I put it in there.

The Court: I think it is in the record top, side and bottom.

Mr. Kelso: Therefore I was insisting that this should not be permitted.

The Court: I have read it a number of times. I think I understand it.

Mr. Cooper: We now offer in evidence site proposal —

The Court: That has been offered, objected to and ruled on.

Mr. Cooper: I will read it now.

[fol. 83] (United States Exhibit 2.)

Cape Girardeau, Missouri,
Post Office and Court House (New)

L-McC May 26 1941 WA1PB 2688

City of Cape Girardeau, Missouri,
By: Hinkle Statler, Mayor,
Cape Girardeau, Missouri.

Gentlemen:

"Pursuant to the authority contained in the Third Deficiency Appropriation Act approved August 25, 1937, and the Federal Public Buildings Appropriation Act approved June 21, 1938, your proposal dated November 26, 1940, to convey to the United States the land hereinafter described as the site for the New Post Office and Court House at Cape Girardeau, Missouri, in exchange for the present Federal building and site which is also hereinafter described, is hereby accepted.

The land to be conveyed to the United States (clear building space, exclusive of sidewalks, etc.) is described as follows:

Lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri: Beginning at a point in the easterly line of Lorimier Street which point is distant 100 feet northwardly from the intersection of the easterly line of Lorimier Street with the center line of Themis Street extended eastwardly; running thence S. 82° 59′ E. on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point; thence S. 6° 58′ W. on a line parallel with the easterly line of Lorimier Street a distance of 280 feet to a point; thence N. 82° 59′ W. on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point in the easterly line of Lorimier Street; thence N. 6° 58′ E. along the easterly line of Lorimier Street a distance of 280 feet to the point or place of beginning.

It is understood that the improvements located on the land hereinbefore described shall become the property of the United States, except the Library Building which shall be removed upon thirty (30) days' notice in writing so to do after title to the land vests in the United States in strict accordance with Paragraph Eight (8) of the "Conditions" forming part of your proposal.

[fol. 84] The land to be conveyed by the United States to the City of Cape Girardeau is described as follows:

Lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri: Fronting 125.5 feet on the southerly side of Broadway Street and extending of that width in a southwardly direction along the easterly side of Fountain Street a distance of 165.175 feet to the northerly side of a 9-foot alley; being the same premises acquired by the United States November 19, 1907, in condemnation proceedings instituted in the Circuit Court of the United States for the Southeastern Division, Judicial District of Missouri, and designated as Case No. 19 in the records of said court.

It is a condition of this acceptance that the United States shall retain possession, custody and control of the present Federal building, rent free, until the new Federal building to be constructed has been completed and occupied by the activities of the United States housed in the present Federal building.

It is understood that the City of Cape Girardeau may be permitted to use and occupy the Court Room in the present Federal building and two rooms on the third floor thereof for the Judge and Clerk of the Court for the period from the date title to the new site is vested in the United States to the date of vacation of the present Federal building, provided such use and occupancy is without expense to the Government and does not interfere with the activities of the Federal Court in said building.

Please have the proper officials of the City of Cape Girardeau endorse upon the accompanying copy of this communication, in the space provided therefor, their unqualified assent to all the terms and conditions of the aforesaid proposal and this letter of acceptance, and promptly mail such assent to this Agency.

Very truly yours,

NEAL A. MELICK,
Acting Commissioner of Public Buildings.

McC:GE:mep SA (Morris) McKee FM-F Doyle.

[fol. 85]

Site Proposal

Form G-42-A

(Revised January 20, 1940)

Fasten Plat, Etc. Here

1-B
(Synopsis No.)

Important Notice To Bidders:

PB-FM-RE

1. There must be attached to the proposal a plat showing the dimensions of the property offered and widths of

all abutting streets and alleys. Such dimensions shall describe clear building space exclusive of sidewalks.

2. If the vendor desires to reserve any building or other improvements on the site it is important that he describe the same in the space provided for that purpose in the form of proposal.

3. The "Conditions" on the reverse of the proposal are incorporated by reference in the proposal. As these "Conditions" constitute important contractual provisions setting forth in detail the obligations of the bidder, it is of extreme importance that they be carefully read prior to submission of the proposal.

Cape Girardeau, Mo.
(City and State)

November 26th, 1940.
(Date)

Commissioner of Public Buildings,
Federal Works Agency,
Washington, D. C.

Sir:

In response to your invitation for offers of property for the new Post Office and Court House at Cape Girardeau, Missouri, the undersigned hereby propose to convey to the United States of America the following described land (clear building space, exclusive of sidewalks, etc.), to-wit:

A tract of ground in the City and County of Cape Garardeau, Missouri, described as follows:

Begin at a point on the east line of Lorimier Street, said point being 100.0 feet north of the intersection of the east line of Lorimier Street and the center line of Themis Street extended; thence S. 82° 59′ E. and parallel to the center line of Themis Street, extended, 240.0 feet; thence S. 6° 58′ W., and parallel to the east line of Lorimier Street 280.0 feet; thence N. 82° 59′ W., and parallel to the center line of Themis Street extended, 240.0 feet to the east line of Lorimier Street; thence N. 6° 58′ E., along the east line of Lorimier Street 280.0 feet to the point of beginning,

as shown by the attached plat prepared by the City Engineer of the City of Cape Girardeau, dated November

25th, 1940 and approved by the Mayor of the City of Cape Girardeau on November 25th, 1940, on which is indicated the correct widths of public streets and alleys abutting the site; together with all of the improvements thereon, except the following: The Library Building situate on the aforesaid land; in consideration of the conveyance from the United States by the usual quitclaim deed to the City of Cape Girardeau, Missouri, conveying the following described parcel of land in the City and County of Cape Girardeau, Missouri, to-wit:

Begin at the southeast corner of the intersection of Broadway and Fountain Streets in the City of Cape Girardeau and measure along the south side of Broadway Street 125 feet and five inches; thence south, parallel with east line of Fountain Street 165.175 feet to an alley; thence west along the north side of said alley 125 feet and five inches to east line of Fountain Street; thence north along east line of Fountain Street 165.175 feet to place of beginning.

The undersigned agrees that the United States shall have the custody and control of the present Federal Building and site thereof and shall have the privilege of occupying the said building without payment of rent until such time as the new building is completed and occupied by the Governmental activities housed in the present Federal Building.

The City may be permitted to use and occupy the Court Room in the present Federal Building and two rooms on the third floor for the Judge and Clerk of said Court for the period from the date title to the new site is vested in the United States to the date of vacation of the present Federal Building, provided such use and occupancy is without expense to the Government and does not interfere with the activities of the Federal Court in said building.

[fol. 85] the undersigned hereby propose to sell or donate to the United States of America for $..... the following described land (clear building space, exclusive of sidewalks, etc.) to-wit:

(Description Of Land)

as shown by the attached plat on which is indicated the correct widths of public streets and alleys abutting the site; together with all of the improvements thereon, except the following:

Note: If The Vendor Desires To Reserve Improvements Or Any Part Of Them It Must Be So Indicated In The Above Space Provided For Such Purpose, Otherwise This Proposal Is For Land, Together With All The Buildings And Improvements Thereon.

(Over)

[fol. 86] The foregoing proposal is submitted in accordance with, and subject to, the terms and conditions of said invitation or advertisement, and the "Conditions" governing purchase of Federal building sites as hereinafter set forth.

The name of the holder of the mortgage on the above property (or his local representative) is .....

CITY OF CAPE GIRARDEAU, MO.

(Seal). By Hinkle Statler, Mayor.

(Signature, State whether as owner or agent. Write plainly).

Street No. .....

P. O. Address .....

The most recent assessed valuation of record on the above described property are:

Land .....$

Improvements .....$

Total .....$

Assessments made (year) 19....

Attest:

W. C. Kaempfer,

City Clerk.

Conditions.

1. Price Adjustment If Less Area. In the event that the land conveyed has less area (clear building space, exclusive of sidewalks, etc.) than indicated by the dimensions given in the description furnished in the proposal, an equitable reduction shall be made in the amount of the purchase price. The foregoing provisions of this paragraph shall not obligate the United States to conclude the purchase of a lesser area than that described in the proposal.

2. Title. Within 30 days from the date of the letter of acceptance, and without additional expense to the United States, the vendor shall cause to be executed and delivered all abstracts or certificates of title, plats, maps, official certifications, affidavits, evidences of title, deeds of conveyance, etc., necessary in the opinion of the Attorney General, to convey to the United States of America a valid and satisfactory title to said land clear of all mineral rights, easements, restrictions, leases, judgments, taxes, and assessments, existing or inchoate, liens, or incumbrances of any sort, at the date of the transfer of the title to the United States. The vendor shall so furnish said title papers, etc., as to make the same in every respect satisfactory to the Attorney General of the United States. The deed to the United States of America shall be typewritten, and the consideration stated in such deed shall be the actual consideration paid by the Government, irrespective of any consideration or payment from other sources to the vendor. (It is not necessary to discharge liens and mortgages until the transfer of title to the Government is about to be made.)

3. Survey. Within 30 days from the date of the letter of acceptance, and without expense to the United States, the vendor shall furnish a careful survey of said site, based on the local land records as required by "Specification for Vendor's Survey" (Public Buildings Administration, Federal Works Agency Form No. 8835-A); have the surveyor set permanent stone or concrete markers at each corner, or bound, of the land; have the description in the deed to the United States conform to the actual measurements and refer to the monuments utilized by the surveyor. Such

survey, etc., shall be first submitted to the Public Buildings Administration, Federal Works Agency, at the earliest practicable date, and all required corrections therein and in the setting of said monuments promptly made to the satisfaction of the Commissioner of Public Buildings.

[fol. 87] 4. Continuation Of Abstracts, Etc. Immediately preceding the payment of the purchase money, the vendor shall have said abstracts or certificates of title continued down to, and including, the date of the recording of the deeds, etc., to the United States and show such recordation, and also have appended to said abstracts or certificates of title the proper official certification showing that all taxes, special assessments, existing or inchoate, charges, liens, judgments, conveyances, mortgages, or incumbrances of any character whatoever, standing as a charge against any part of said site at, or before, the date of recordation of said deeds to the United States, etc., have been duly paid, discharged, and released of record, so that an absolutely clear title to the whole of said site without restriction or reservation of any nature, shall then be vested in the United States; all without additional expense to the United States.

5. Condemnation. That in case, in the opinion of the Federal Works Administrator it becomes desirable to condemn any portion of said site or any interest pertaining thereto, the United States shall have the option to require that said vendor shall promptly furnish sufficient security (satisfactory to the United States Attorney in charge of the case) to guarantee that the cost of the whole site to the United States, however acquired, shall not exceed the price named in the first paragraph of the attached acceptance, and that said vendor will furnish such papers, etc., above referred to, including bond required by paragraph 8 of these conditions, as the Attorney General may require, and pay the usual costs incident to such proceedings so necessitated by the state of the title.

6. Dedications And Vacations. The vendor shall furnish promptly upon the request of the United States Attorney, such duly authenticated evidence as may be required by the Attorney General satisfactorily to establish

that the public alleys and roadways abutting the site, as shown in the proposal, have been duly dedicated to the public and legally accepted by the proper authorities of the municipality in which said site is situated, and that the same have been actually opened and will be kept open and improved as are other public streets and alleys in said municipality. In the event that any such alleys or roadways have not been duly dedicated to the public and legally accepted as aforesaid, the vendor agrees that he will cause the same to be duly dedicated and legally accepted. Also, should the vacation of any alley, passageway, or street, or portion of such alley, passageway, or street, now lying within the area comprising the entire site, be required to vest in the United States a valid unencumbered title to the entire site, the vendor must procure such vacation and furnish similar evidence of the due accomplishment thereof, without expense to the United States.

7. Conditions Entire Site Be Acquired. If the proposed site is composed of more than one parcel of land, the Federal Works Agency shall be under no obligation to acquire any parcel until the Attorney General shall have rendered a favorable opinion on the title to all the parcels embraced in the entire tract to be acquired; and, where any portion of the site is to be acquired by condemnation proceedings, the Federal Works Agency shall not be required to conclude the purchase of any parcel until the award in condemnation shall have been rendered and found to be in an amount satisfactory to that Agency.

[fol. 88] 8. Clearing Of Site: (a) Upon thirty (30) days' notice in writing so to do after title to the land comprising the site has vested in the United States, the vendor shall be obligated, without expense to the United States and to the satisfaction of the custodian of the site (1) if buildings or other improvements have been reserved by the vendor, to remove the same down to ground level; and (2) if buildings or other improvements have been reserved by the vendor or if the site is unimproved, to remove all tracks, poles and wires (overhead or underground), all gas, water and heating pipes, ducts, etc., conduits, ditches and sewers crossing the site or, in lieu of removal thereof,

to plug at the lot lines any such pipes, ducts, conduits or sewers.

(b) Immediately after title to such land has vested in the United States (or, if removal of reserved buildings or other improvements shall thereafter create a dangerous condition, then immediately after such condition is created), the vendor shall, without expense to the United States, rail off or cover, to the satisfaction of the custodian of the site, all open wells, cellars or other excavations on the site.

(c) Before payment is made to the vendor, the vendor shall furnish a good and sufficient bond (in such amount as the United States Attorney may deem ample) to guarantee to the United States the performance of all of the obligations of the vendor as set forth in subparagraphs (a) and (b) of this paragraph 8.

(d) If the vendor shall fail to comply with any of the obligations set forth in subparagraphs (a) and (b) of this paragraph 8, the Government, if deemed in its interests by the Commissioner of Public Buildings of the Federal Works Agency, may perform the work, sell or dispose of any buildings or other improvements, or any portion thereof, and collect from the vendor or the obligors on the bond referred to in subparagraph (c) of this paragraph 8 all costs incurred in excess of the proceeds of any such sale.

9. Ground Rental. In the event that the buildings on the land are reserved to the vendor, a reasonable ground rental shall be paid by the vendor to the United States for the period from the date title to the land is vested in the United States until the date of service of the thirty (30) day notice to clear the site or until the site has been cleared by the vendor, whichever date is the earlier.

10. Rental—Land And Buildings. When buildings and improvements are not reserved by the vendor a reasonable rental for the land and buildings shall be paid by the vendor to the United States for the period from the date title to the land is vested in the United States until the date of vacation of the premises.

11. Attempted Variations. That no variation or departure from the terms of the contract of which these "Con-

ditions" form a part will be binding on the United States unless previously agreed upon in writing by the Federal Works Agency.

12. The vendor represents and it is a condition of acceptance of this proposal that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or ~~part~~ of this contract or agreement, or to any benefit that may arise thereupon; but this provision shall not be construed to extend to the contract if made with a corporation for its general benefit.

[fol. 89] Resolution Authorizing and Directing the Mayor of the City of Cape Girardeau, Missouri to Execute Offer to Exchange Property With United States of America.

Whereas, on July 15, 1940 the Council of the City of Cape Girardeau, Missouri authorized and directed the Mayor and City Clerk to execute an offer to exchange property with the United States of America, and

Whereas, since said date further study has been made and negotiations have been conducted between the City and representatives of the United States, and

Whereas, the Council is now fully informed and deems it to be to the interest of the City and in furtherance of the general welfare thereof, to convey a parcel of the property now owned by the City to the United States of America for the purpose of constructing thereon a Post Office and Federal Court Building, and to accept in exchange therefor the parcel of land and building thereon now owned by the United States of America and used as the present Post Office and Federal Court Building;

Now, Therefore, Be It Resolved That the Mayor and City Clerk be authorized and directed to execute for and in behalf of the City of Cape Girardeau an offer to convey to the United States of America the following described parcel of land, to-wit:

A tract of ground in the City and County of Cape Girardeau, Missouri, described as follows:

Begin at a point on the east line of Lorimier Street, said point being 100.0 feet north of the intersection of the east line of Lorimier Street and the center line of Themis Street extended; thence South 82° 59′ E., and parallel to the center line of Themis Street extended, 240.0 feet; thence South 6° 58′ W., and parallel to the east line of Lorimier Street 280.0 feet; thence North 82° 59′ W., and parallel to the center line of Themis Street extended, 240.0 feet to the east line of Lorimier Street; thence North 6° 58′ E., along the east line of Lorimier Street 280.0 feet to the point of beginning.

[fol. 90] for the purpose of constructing thereon a Post Office and Federal Court Building, and to accept in exchange therefor and in consideration for the conveyance by the City the following described parcel of land and building thereon now owned by the United States of America, to-wit:

Begin at the southeast corner of the intersection of Broadway and Fountain Streets in the City of Cape Girardeau, and measure along the south side of Broadway Street 125 feet and five inches; thence south, parallel with east line of Fountain Street 165.175 feet to an alley; thence west along the north side of said alley 125 feet and five inches to the east line of Fountain Street; thence north along the east line of Fountain Street 165.175 feet to place of beginning, all located in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri,

for the uses and purposes of the City of Cape Girardeau, Missouri.

Be It Further Resolved, that the Mayor and City Clerk be directed to make and file an application with the United States of America to continue the use of the building now being used for library purposes upon payment of a monthly rental therefor of One Dollar ($1.00) per month for such period of time as may be consistent with the policy and requirements of the United States.

Be It Further Resolved, that in the event said above authorized offer is accepted by the United States of America, that the Mayor and City Clerk be authorized and are hereby authorized and directed to take such steps as may

be necessary to consummate the exchange of said property for the purposes aforesaid.

Dated and adopted this 26th day of November, 1940.

(Seal) HINKLE STATLER

Attest: W. C. Kaempfer.
City Clerk.

[fol. 91] City of Cape Girardeau, Mo.
Commission Form
Hinkle Statler, Mayor

Superintendent Department of Public Affairs

Wm. C. Kaempfer, City Clerk

Verna Lee Landis, Deputy City Clerk

Commissioners

Raymond E. Beckman
Supt. Department of Accounts
And Finance And Parks And
Public Property.

Philip H. Steck
Supt. Fire Department And
Department Of Public Safety.

Frank Batchelor
Supt. Department Of Streets
And Public Improvements.

Albert Schultz, City Treasurer
R. B. Oliver, III, City Atty. & Counsellor
John R. Walther, City Engineer
E. W. Hirsch, Chief of Police
Paul E. Kaiser, Police Magistrate
C. C. Summers, Health Officer
Robert Kammer, Fire Chief
W. C. Blair, City Assessor
J. W. McCullough, Street Commissioner

November 26th, 1940.

Commissioner of Public Buildings
Federal Works Agency
Washington, D. C.

Dear Sir:

We have today executed a proposal to convey a certain parcel of land to the United States of America, to be used as a site on which to construct a new Post Office and Federal Court building in the City of Cape Girardeau, Missouri, in exchange for a parcel of land on which is now located the present Post Office and Federal Court building in the City of Cape Girardeau.

Upon the site proposed to be conveyed to the United States by the City of Cape Girardeau is located a Public Library Building owned by the City of Cape Girardeau. This Library Building and its further use by the City will in no-way interfere with the construction of the new Post Office and Federal Court building.

We hereby make application for the use of said building for library purposes and offer, in the event the offer of the City of Cape Girardeau should be accepted, to pay a rental of $1.00 per month for the use of said building for such period of time as the building may be so used by the City.

This application is made for and in behalf of the City of Cape Girardeau by direction of its City Council.

(Seal) HINKLE STATLER,
Mayor.

Attest: W. C. Kaempfer,
City Clerk.

(Part of United States

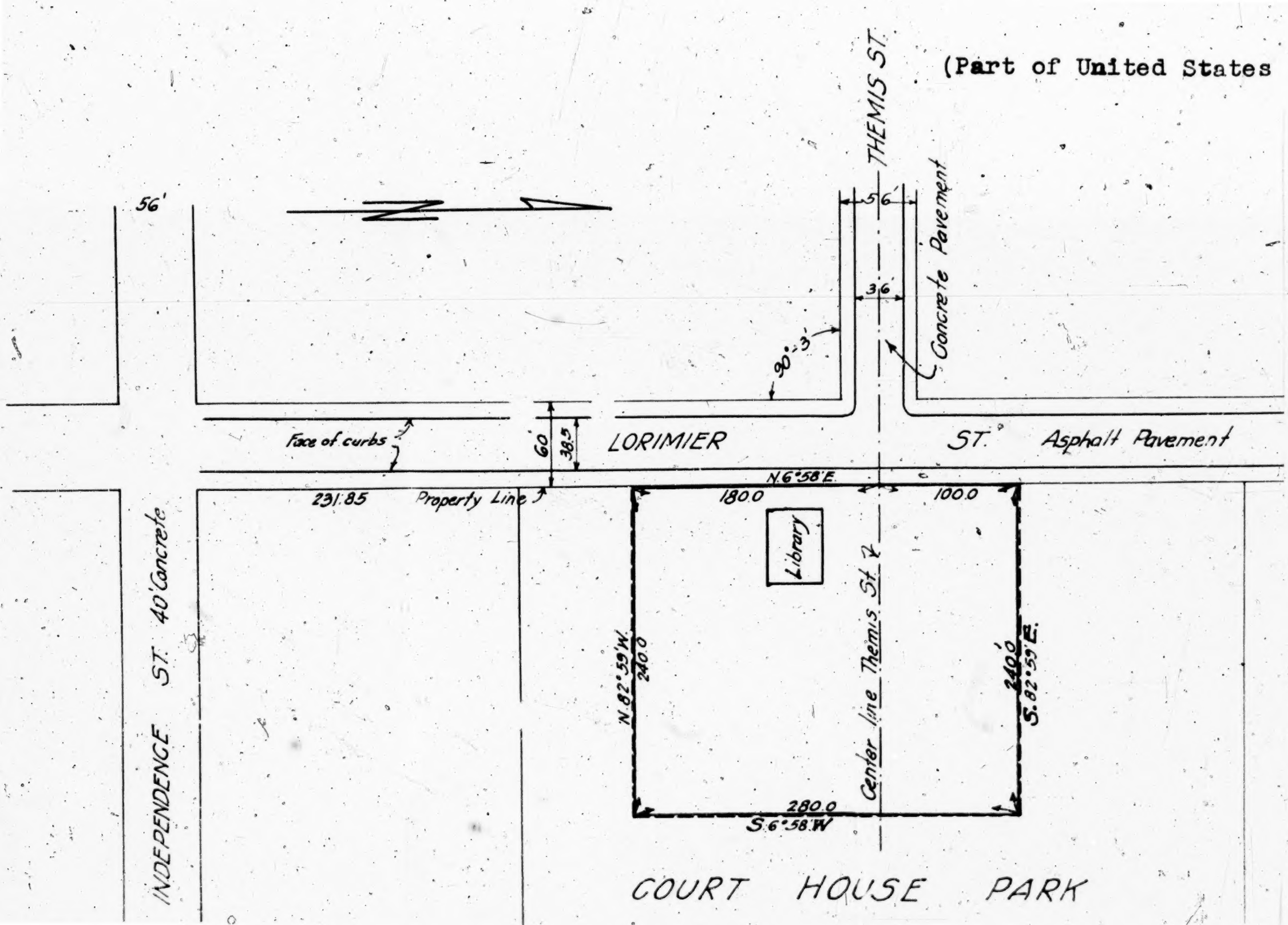
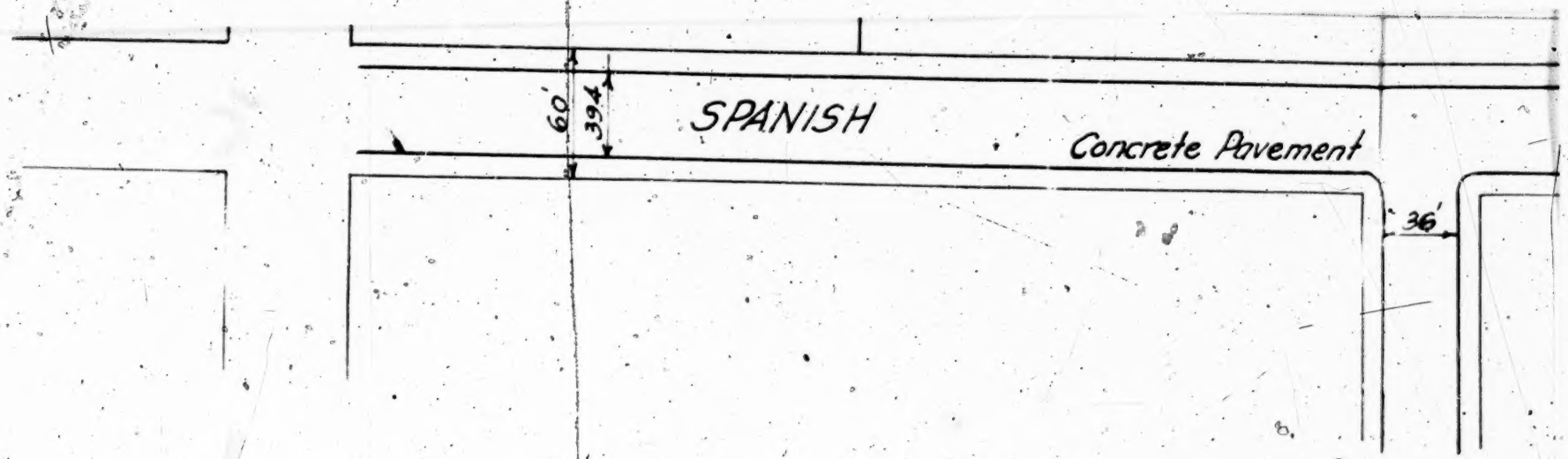


Exhibit 2.)

B


60'
394
SPANISH
Concrete Pavement
36'

Scale 1 in. = 80 ft

Prepared Nov 25, 1940

John [illegible]
City Engineer

Approved Nov 25, 1940

[illegible] Statler
Mayor

[fol. 93] The Court: Do you claim all the provisions you are reading are applicable to this case?

Mr. Cooper: No, sir, I am not. I was offering it all because I assumed there would be an objection if I selected certain parts and offered them.

The Court: Proceed.

Mr. Cooper: I thought it would be faster to offer it all.

The Court: Well, you have offered it. I suggest you dispense with reading the conditions, and I will read them before I pass on the case.

Mr. Cooper: Very well.

The Court: I gather from the early part of the exhibit that you entered into an agreement with the City for exchange?

Mr. Cooper: That is right.

Mr. Cooper: We now read the resolution authorizing and directing the Mayor of the City of Cape Girardeau, Missouri, to offer to exchange property with the United States of America pursuant to that proposal. That is part of Exhibit 2. Dated this 26th day of November, 1940. Hinkle Statler, Mayor.

Attest: W. C. Kaempfer, City Clerk, and the City seal attached.

Above resolution will be found on pages 89 and 90 just preceding.

[fol. 94] Mr. Kelso: Now then, Defendant Carmack wants to add this objection to the objections heretofore made to the offering: That the description of the property sought to be condemned, as described in this offer and also in the amended petition, shows that the proposal is not in con-

formity with the terms specified in notice asking for submission of the offers of sites for the new post office in Cape Girardeau as stated, and the resolution referred to is not competent under any of the allegations contained in the second amended petition, for the reasons heretofore stated.

The Court: Very well. Overrule the objection.

May I at this time ask you what is your theory, what bearing does the exhibit have on the evidence in this case which, as I understand, is the right of the Government to maintain this proceeding?

Mr. Cooper: The only theory that I have for offering this, Your Honor, is that the authority shows—under which the suit is brought—shows there is an offer and acceptance to exchange, and this is simply evidence of that offer. I think the authority itself is sufficient, but this is just corroborative. That is all.

Mr. Blanton: Also on the question, Your Honor, that they raised in their answer, that it will destroy the use of that property as a public facility, on the question of the reasonableness of the selection of the site. They contend [fol. 95] and the Court of Appeals in its opinion discussed the fact that if you deny the right they would not have a place to hold court; and this shows they would be given this court-room and some room on the third floor to hold court. In other words, that there would not be a cessation of the City governments.

Mr. Kelso: The suggestions made by Counsel: I think the record should show the objection that I just made was offered to the introduction. It appears as a matter of sequence, it appears it was offered afterwards, and instead of offering the motion to strike it out, let the record show the objection.

The Court: The record may so show.

Mr. Cooper: I now ask the reporter to designate as "United State Exhibit 3" certified copy of recommendations for new projects made to the Federal Works Administrator and to the Postmaster-General, Fourth Assistant Postmaster-General, and the Commissioner of Public Buildings, and approved by the Acting Postmaster-General and the Federal Works Administrator, Your Honor, which shows—

Mr. Kelso: We would like an opportunity to see the document before it is offered, Your Honor.

The Court: You shall see the document before I admit it.

Mr. Kelso: Well, that is what he is reading.

Mr. Cooper: I wasn't reading it, I was identifying it.

Mr. Kelso: I beg your pardon.

Mr. Cooper: If you will let me finish.

[fol. 96] Mr. Kelso: All right.

Mr. Cooper: Dated June 11, 1940, and June 12, 1940, showing, as we think, the joint designation of the City of Cape Girardeau for a new post office building by Federal Works Administrator and the Postmaster-General, and allocation of the funds therefor. (Which document is marked "U. S. Exhibit 3")

(The document is passed to defendant's Counsel)

Mr. Cooper: While they are examining that, Your Honor, I ask the reporter to mark joint selection, by the Federal Works Administrator and the Postmaster-General, of the particular site here in question "United States Exhibit 4" (The paper is marked as requested)

The Court: What is the date of Exhibit 4?

Mr. Bowman: June 10, 1943.

Mr. Cooper: That is right.

Mr. Kelso: Plaintiff's Exhibit 3 is objected to by defendant Carmack on the ground that it does not on its face indicate that there was any authority claimed by anyone to condemn property not devoted to a public use, and does not make any reference to the selection of any particular property in Cape Girardeau to be used as a site, and it is not competent under any allegation contained in plaintiff's amended petition as to the selection by the Postmaster-[fol. 97] General and the Administrator of Public Works Agency of the site sought to be condemned.

The Court: Overruled.

Mr. Cooper: I will now read in evidence Government's Exhibit No. 3.

Mr. Kelso: And this document does not authorize any condemnation of any property.

The Court: Let Counsel read Exhibit 3, then you can make your objection to Exhibit 4.

[fol. 98] (United States Exhibit 3—4/18/44 AP.)

Federal Works Agency
Washington

Office Of The Administrator

I hereby certify that the annexed paper (two sheets) is a true photostatic copy of letter dated June 12, 1940 from the Fourth Assistant Postmaster General and the Commissioner of Public Buildings to the Federal Works Administrator and the Postmaster General recommending the selection of a project for the Cape Girardeau, Missouri, P. O., Ct. H., etc., site and building, including administrative expenses, site to be acquired either by purchase or exchange, with the approval of the Acting Postmaster General and the Federal Works Administrator endorsed thereon under dates of June 11, 1940 and June 12, 1940 respectively, the original of which is on file in the Federal Works Agency.

Seal
Federal Works
Agency
United States
of America
1939

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on this 13th day of May, 1943.
By Direction of the Federal Works Administrator:

ALAN JOHNSTONE,
General Counsel,
Federal Works Agency.

[fol. 99]

Federal Works Agency
Public Buildings Administration
Washington

Office Of The Commissioner — June 12, 1940.

In Replying, Quote The Above Subject, Building, and These Letters—FM

The Honorable,
The Federal Works Administrator

The Honorable,
The Postmaster General

Gentlemen:

The Joint Committee, appointed by you to make recommendations regarding public building projects to be erected under provisions of the Acts approved August 25, 1937, and June 21, 1938, authorizing $130,000,000 for public building construction outside the District of Columbia, submits the following for your consideration.

To date the Federal Works Administrator and the Postmaster General have authorized 776 projects with limits of cost totaling $127,080,450.

Recommendations For New Projects

Cape Girardeau, Missouri, P. O., Ct. H., etc.

Site and building, including administrative expenses — $430,000

Site to be acquired either by purchase or exchange.

Pittsburgh, Pennsylvania, Homewood Postal Station

Site and building, including administrative expenses	$135,000

Oxford, Pennsylvania, P. O. Etc.

Site and building, including administrative expenses	$ 75,000

Summary Of Recommendations

Authorized to date—Act 8/25/37—391 projects with limits of cost totaling	$ 69,175,050
Authorized to date—Act 6/21/38—385 projects with limits of cost totaling	57,905,400
New projects (3)—6/21/38	640,000
Total amount recommended to date—779 projects	$127,720,450

[fol. 100] Reservations under Act of 8/25/37:

Projects not selected (2)	$ 140,000
Increases authorized—8/25/37 (2)	54,000
Increases authorized—5/6/39 (2)	290,000
Increases authorized—8/9/39 (4)	198,000

Reservations under Act of 6/21/38:

Projects not selected (5)	480,000
Increases authorized—6/21/38 (2)	246,000
Increases authorized—5/6/39 (13)	768,000
Increases authorized—8/9/39 (1)	20,000
Total amount of recommendations and reservations	$129,916,450

Very truly yours,

W. E. REYNOLDS,
Commissioner of Public Buildings.

S. W. PURDUM,
Fourth Assistant Postmaster General.

Approved:

JOHN CARMODY,
Federal Works Administrator.

Date June 12, 1940.

Approved:

S. W. PURDUM,
Acting Postmaster General.

Date June 11, 1940.

[fol. 101] Mr. Cooper: Now we next offer in evidence "U. S. Exhibit 4".

Mr. Bowman: The objection is, it has no connection with the condemnation proceedings.

The Court: Overruled.

(Plaintiff's Counsel reads "U. S. Exhibit 4").

The Court: Can it be admitted that is the description?

Mr. Cooper: That is the same description used in the petition, Your Honor, between Frank Walker, Postmaster-General, and Philip B. Fleming of Public Works Administration.

Mr. Kelso: Is that signed by Mr. Walker?

Mr. Cooper: Frank Walker, Postmaster-General, yes, sir.

Mr. Kelso: What does that indicate (indicating)?

Mr. Cooper: I don't know. It is a certified copy of that showing his signature.

Mr. Kelso: I am calling attention to the fact that the name of Frank Walker, Postmaster-General, has under it the initials of someone.

The Court: You are questioning whether it is signed by the Postmaster-General?

Mr. Kelso: That is right. It shows on its face that it was not. Somebody else signed his name to it.

The Court: Let me see that exhibit. (A paper is passed to the Court).

The Court: Proceed.

[fol. 102] (United States Exhibit 4—4/18/44 AP.)

Federal Works Agency
Washington

Office Of The Administrator

I hereby certify that the annexed paper is a true photostatic copy of memorandum dated June 10, 1943, signed by the Postmaster General and the Federal Works Administrator evidencing their selection of the land comprising the Cape Girardeau, Missouri, Post Office and Court House (New) site, the original of which is on file in the Federal Works Agency.

Seal
Federal Works
Agency
United States
of America
1939

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on this 8th day of July, 1943.

By direction of the Federal Works Administrator:

ALAN JOHNSTONE,
General Counsel, Federal Works Agency.

[fol. 103] Federal Works Agency P. B. A.

June 10, 1943.

Pursuant to the authority contained in the Federal Public Buildings Appropriation Act, approved June 21, 1938, selection is hereby made of the following site for the project heretofore selected.

Act of 6/21/38.

Cape Girardeau, Missouri, Post Office and Court House (New).

A tract of land lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri, more particularly described as follows: Beginning at a point in

the easterly line of Lorimier Street which point is distant 100 feet northwardly from the intersection of the easterly line of Lorimier Street with the center line of Themis Street extended eastwardly; running thence South 82 degrees 59 minutes East, on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point; thence South 6 degrees 58 minutes West on a line parallel with the easterly line of Lorimier Street a distance of 280 feet to a point; thence North 82 degrees 59 minutes West on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point in the easterly line of Lorimier Street; thence North 6 degrees 58 minutes East along the easterly line of Lorimier Street a distance of 280 feet to the point or place of beginning; together with the improvements thereon, except the Library building.

PHILIP B. FLEMING,
Federal Works Administrator.

FRANK C. WALKER,
Postmaster General.

[fol. 104] Mr. Cooper: Next desire to offer in evidence plat of the site being condemned in this case as prepared by John R. Walther, City Engineer, which was filed in these court proceedings as past of the files in this case. Shall we mark it as an exhibit? It was filed December 6, 1941. Shall we mark it as an exhibit?

The Court: I think that would be better to keep track of it.

Mr. Cooper: I ask the reporter to mark that "United States Exhibit 5". (The document is marked as requested).

Mr. Kelso: We offer the same objection to the introduction of this exhibit that we have offered heretofore to the introduction of U. S. Exhibits 4, 3, 2 and 1.

The Court: Very well.

[fol. 105] (United States Exhibit 5.)

In The United States District Court Eastern District Of Missouri, Southeastern Division.

United States Of America, Plaintiff,
Docket No. 482 vs. At Law
Certain Land Situate In The City Of Cape Girardeau, County Of Cape Girardeau, State Of Missouri, And The City Of Cape Girardeau, Missouri, a Municipal Corporation, et al., Defendants.

Order.

On oral Motion of the United State of America, by Harry C. Blanton, United States Attorney, plaintiff is granted leave to file in this cause, the attached plat describing the land taken in and by virtue of this proceeding.

GEO. H. MOORE,
United States District Judge.

Dated this 5th day of December, 1941.

(Filed in U. S. District Court on December 6, 1941.)

CITY OF CAPE GIRARDEAU OWNER

1½ STORY BRICK HO

VACANT

6½ CONC WALK 40.0

40 ROW MAPLES 40.0 OC

6 CONC CURB TO CONC GUTTER GOOD

BROADWAY STR. ELEV AT INTERSECTION 395.70

STA 304 NORTH

EL 10.35 TO BUILDING 2 NW

BROWN ST

20" MAPLE

16 MAPLE

CAN 2

S 82° 59 E 240

BANDSTAND 20. CONC. FLOOR EL 405.93

402.5 VALLEY 402.5 402.3 126 402.4 402.2 402.2

16 MAPLE 15 E 35 OF N.W. COR.

CONC MON

02 ELM SE E 55.

89° 51'

402.0 402.2 402.3 402.6 402.3

CAN 3

22 MAPLE 88 E 203

19 MAPLED 131 E 22 S

402.2 402.1 402.2

8 CONC WALK

6 OAK 85 E 385 S

402.8 402.9 402.8 402.8 402.4 402.2 402.2

MEMORIAL FOUNTAIN

6 CONC WALK FOOR

CONC FLOOR EL 402.5

24

4'4 CONC PED FOR FOUNTAIN

402.7 402.8 402.8 402.6 402.4 402.6

4½ CONC WALK

PIT 30

8 MAGNOLIA 85 E 385

10" MAPLE 181 E 366

CONC WALK

100

4 STEEL FLAG 42 HIGH 3'3 CONC BASE

PIT 7

4025 4025 4024 4025 4023 4025 402.7 4026

20 MAPLE BAD

10 MAPLE 83 E 215

PUBLIC DRINKING FOUNTAIN

2 SPRUCE

PIT 2

402.2 4023 4023 4023 402.16 4023 4023

9½ CONC WALK 148

2 STORY BRICK BUILDING GROUND FLOOR ELEV 402.79

FISHWAY

BASEMENT CONC FLOOR 382

55

90

24 MAPLE 93 E 110 S

ELEV TOP 402.71

MEMORIAL SUN DIAL

UNDERGROUND TEL CABLE

TEL LINE

402.2 402.4 402.6 402.7

CONC WALK

DISTRIBUTION POLE

4023 4024 4019 4018 18 OAK 83 E 141 S 4016 4022 4023

PIT 10

U.S. COAST & GEODETIC SURVEY BM ELEV 402.932

COURT HOUSE

4½ CONC WALK

CONC. WALK

EL COVER 401.98 FL INVERT 389.10

CAN 35

2 GAS MAIN

32 56

THEMIS STREET CONC PAVED GOOD

8" WATER MAIN

TEL LINE

CONC. WALK

VED GOOD

H.

POLE & MAPLES

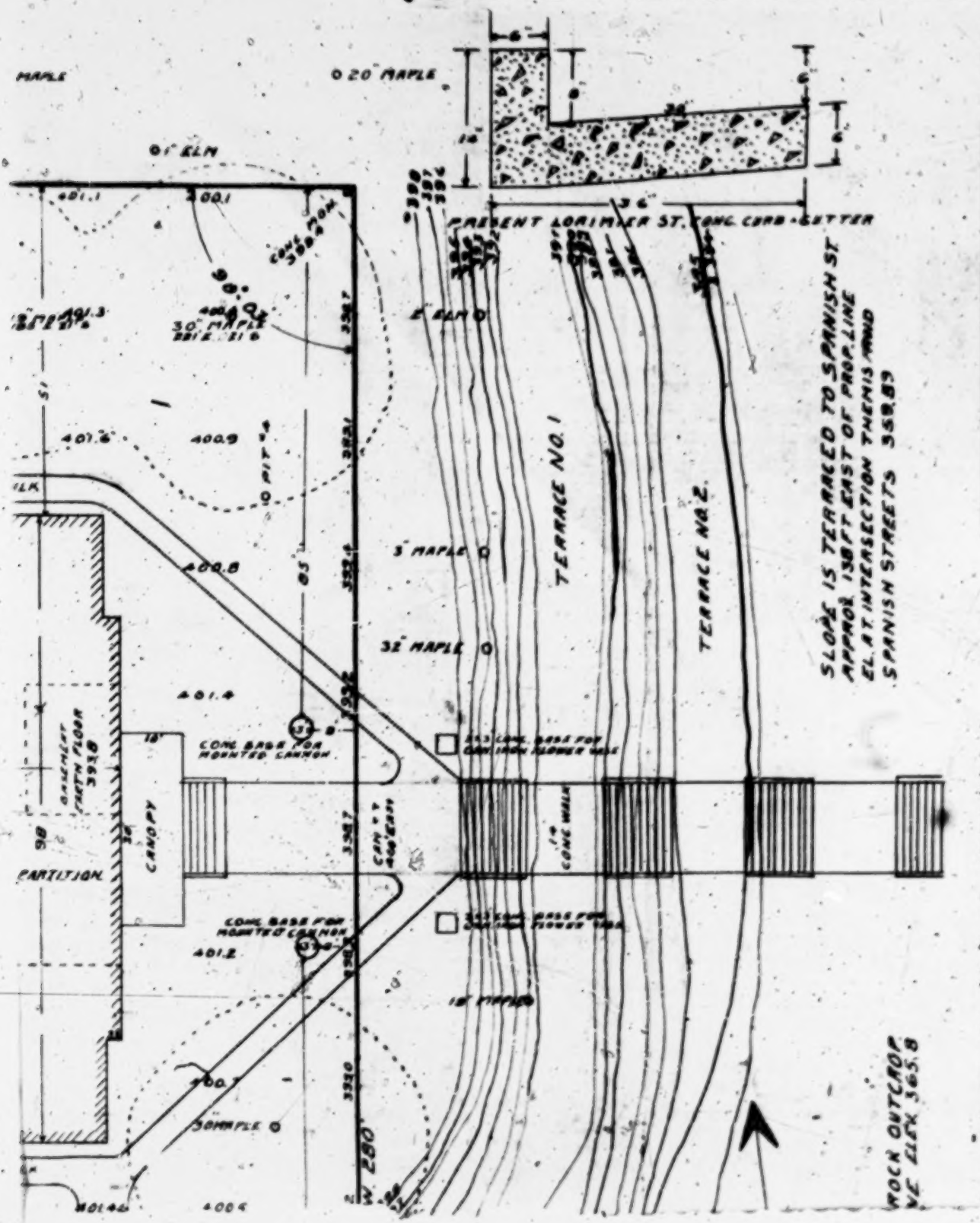
MISSOURI UTILITIES CO. P.L. LINE

CONC. FLOOR 4.2 HOUSED WITH HOUSE 2.5

EL TOP 402.16

401.8 401.9 402.4 402.4 402.3 402.4 402.4 402.4

(United States Exhibit 5.)


MAPLE
20" MAPLE
16" ELM
PRESENT LORIMIER ST. CONC. CURB & GUTTER
TERRACE NO. 1
TERRACE NO. 2
SLOPE IS TERRACED TO SPANISH ST
APPROX. 138 FT EAST OF PROP. LINE
EL. AT INTERSECTION THENIS AND
SPANISH STREETS 358.89
32" MAPLE
3" MAPLE
CONC. BASE FOR MOUNTED CANNON
CONC. BASE FOR CAST IRON FLOWER VASE
CONC. BASE FOR MOUNTED CANNON
CONC. BASE FOR CAST IRON FLOWER VASE
CANOPY
PARTITION
CONC. WALL
18" PIPELINE
ROCK OUTCROP EL. EL. 365.8
W 280'
401.1
400.1
401.6
400.9
400.8
401.4
401.2
400.6
401.3
400.4
400.2
401.8
400.7
400.5
400.0
401.0
400.3
400.7
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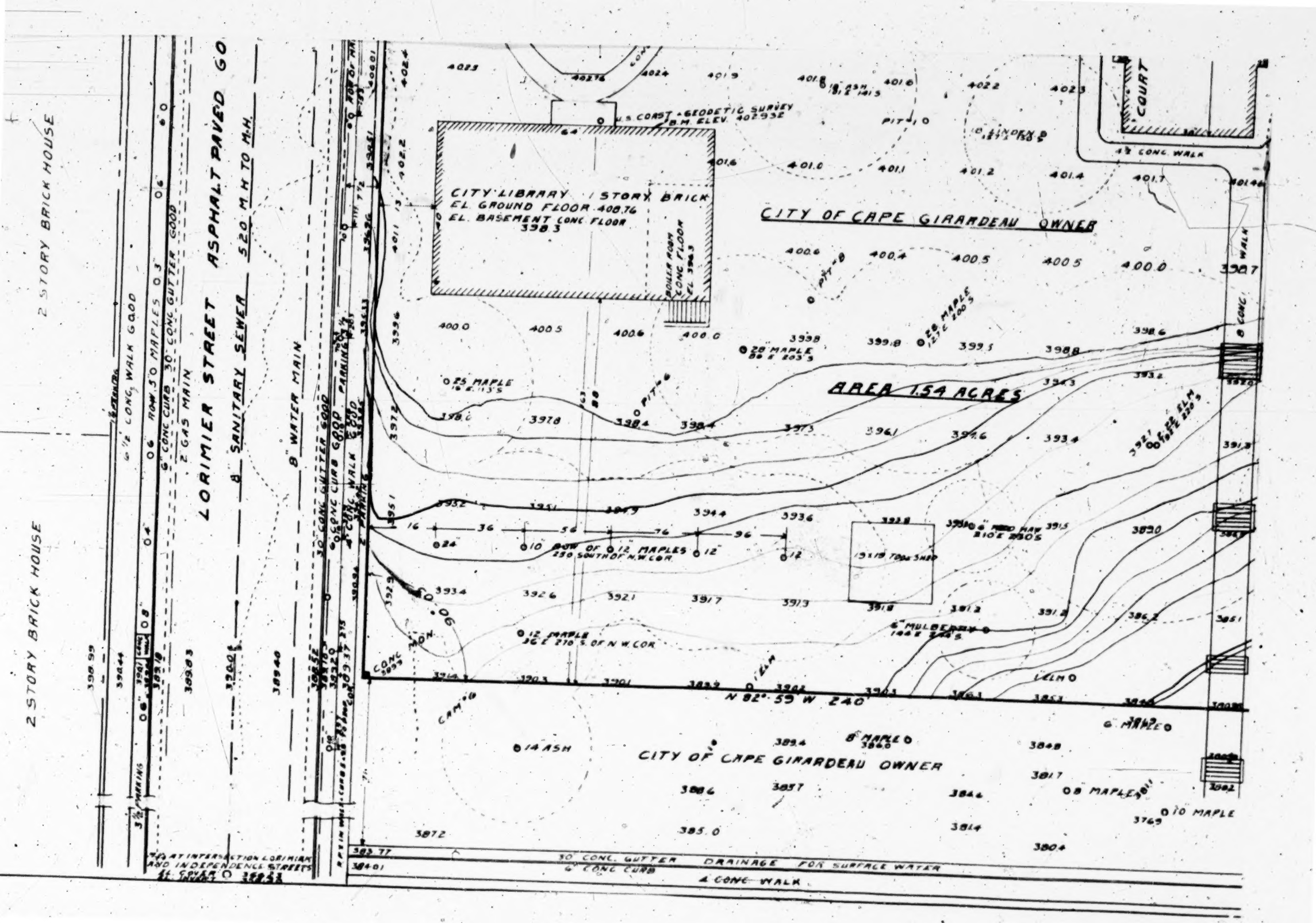
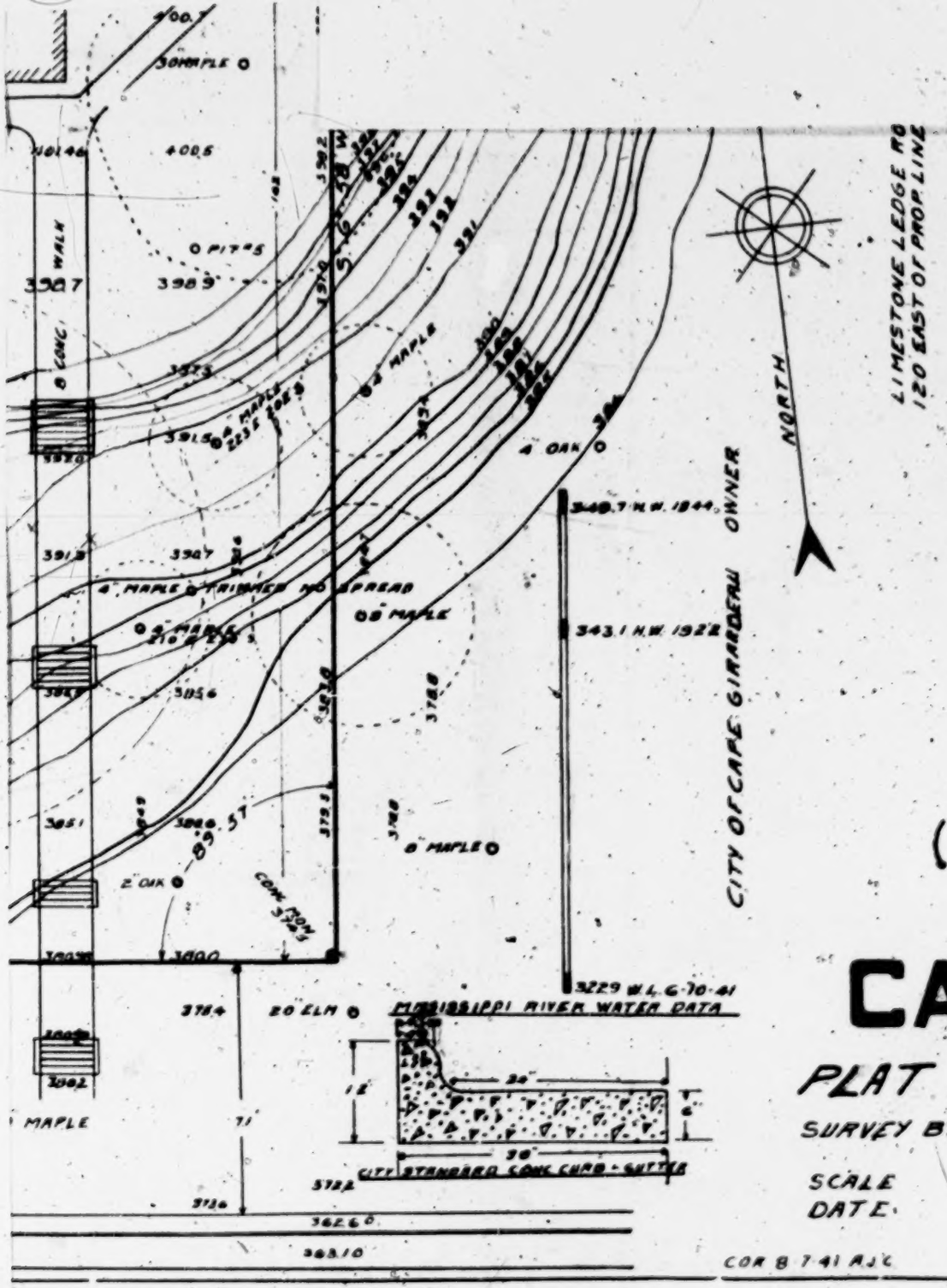
401.4
400.6



2 STORY BRICK HOUSE
2 STORY BRICK HOUSE
LORIMIER STREET ASPHALT PAVED GO
8" SANITARY SEWER 520 M.H. TO M.H.
8" WATER MAIN
6 1/2" CONC. WALK GOOD
ROW 5.0 MAPLES
6" CONC. CURB 30" CONC. GUTTER GOOD
2" GAS MAIN
30" CONC. GUTTER GOOD
CONC. CURB GOOD
4" CONC. WALK GOOD
PARKING
CITY LIBRARY 1 STORY BRICK
EL. GROUND FLOOR 408.76
EL. BASEMENT CONC. FLOOR 398.3
BOILER ROOM CONC. FLOOR EL. 396.3
U.S. COAST & GEODETIC SURVEY B.M. ELEV. 402.932
CITY OF CAPE GIRARDEAU OWNER
AREA 1.54 ACRES
COURT
4 1/2 CONC. WALK
8 CONC. WALK
28" MAPLE
25 MAPLE
ROW OF 12 MAPLES 250 SOUTH OF N.W. COR.
12 MAPLE 36 E 270 S. OF N.W. COR.
19 X 19 TOOL SHED
6" MULBERRY
N 82° 59' W 240'
14 ASH
8" MAPLE
6" MAPLE
8 MAPLE
10 MAPLE
CITY OF CAPE GIRARDEAU OWNER
30" CONC. GUTTER DRAINAGE FOR SURFACE WATER
6" CONC. CURB
4 CONC. WALK
AT INTERSECTION LORIMIER AND INDEPENDENCE STREETS



UTILITIES:

WATER IS SUPPLIED BY THE MISSOURI UTILITIES CO. 8" MAIN IS LOCATED ON LORIMIER ST. ABUTTING THE SITE.

GAS IS SUPPLIED BY THE MISSOURI UTILITIES CO. 8" MAIN IS LOCATED ON THE WEST SIDE OF LORIMIER ST.

POWER AND LIGHT ARE SUPPLIED BY THE MISSOURI UTILITIES CO. SERVICE IS OVERHEAD. PLAT SHOWS LOCATION OF LINE

TELEPHONE SERVICE IS FURNISHED BY THE SOUTHEAST MISSOURI TELEPHONE CO. OVERHEAD SERVICE. PLAT SHOWS UNDERGROUND ENTRANCE TO PRESENT CITY BUILDING.

THE CITY HAS NO ESTABLISHED BUILDING FOR THIS LOCATION. SEE REPORT.

6"x6" 3' CONCRETE MONUMENTS ARE SET AT ALL CORNERS.

TREES IN GENERAL ARE IN GOOD CONDITION AND IN SO FAR AS POSSIBLE SHOULD BE PRESERVED. SEE REPORT.

SOIL IS RED SANDY CLAY. ESTIMATED BEARING AND DETAILS ARE SHOWN ABOVE

ENCROACHMENTS: MEMORIAL BANDSTAND ENCHROACHES ON SITE APPROX 3 FEET. POWER AND LIGHT AND TELEPHONE SERVICE WIRES ENCROACH AS SHOWN ON THE PLAT.

I CERTIFY THAT THE STREET AND LOT LINES AND THE ELEVATION AND GRADE OF SEWERS, STREETS, CURB AND SIDEWALK CONFORM TO THOSE ESTABLISHED BY THE CITY.

John R Wetzler
CITY ENGINEER

(United States Exhibit 5.)

CAPE GIRARDEAU [illegible]

PLAT OF POST OFFICE AND COURT HOUSE SITE

SURVEY BY: Albert J Chandler
ASST. CONSTR. ENGINEER

SCALE 1" = 16'

DATE: JUNE 10, 1941

COR B 7-41 AJC

[fol. 108] Mr. Cooper: Now we desire to have marked "U. S. Exhibit 6" and offer in evidence a letter from the Department of Justice to United States Attorney, dated October 16, 1941, directing the filing of the original suit, Your Honor.

Mr. Kelso: In addition to the objections heretofore made to the offering of testimony and other formal exhibits, we add to this exhibit the further objection that there is no authority in the letter for the filing of the second amended petition after the matter had been passed upon by the Circuit Court of Appeals and reversed, and that that does not authorize this proceeding at this time.

The Court: Overruled.

[fol. 109] (United States Exhibit 6—4/18/44 AP.)

Address reply to
"The Attorney General"
and refer to
Initials and Number
JEW—RRMcL
33-26-210

Department of Justice
Washington, D. C.

October 16, 1941

Mr. Harry C. Blanton
United States Attorney
St. Louis, Missouri

Dear Mr. Blanton:

There are transmitted herewith a certified copy of a letter dated September 25, 1941, in which the Acting Administrator of the Federal Works Agency requests the institution of a proceeding to condemn land for a post office and custom house site at Cape Girardeau, Missouri, a deed from the City of Cape Girardeau, Missouri, purporting to survey title to the land to the United States, copies of resolutions of the City Council authorizing the conveyance, the abstract of title and photostatic copies of related papers.

The acquisition of this land through condemnation proceedings is necessitated by the provision in the deed shown

at pages 58, 59 and 60 of the abstract that the land shall forever be used for the public purposes originally intended and that the land should never become private property. In accordance with paragraph No. 8 of the accepted site proposal, it is requested that you procure from the city officials security sufficient in your discretion to insure the removal of the buildings and improvements upon the land, excepting only the library building, within thirty days notice in writing so to do after title has become vested in the United States and without expense to the United States.

When you have obtained the above-mentioned security, will you not prepare and file a petition for condemnation of the land and then conduct the proceeding to a conclusion in accordance with the general regulations of the Department relating to condemnation proceedings. There should be named as defendants in the petition all persons, firms, and corporations who may have, or who may claim to have, any interest in the land as disclosed by an examination of [fol. 110] the enclosed abstract and a physical inspection of the premises. It appears from an examination of the abstract in the Department that the defendants named should include the following: The City of Cape Girardeau, Missouri; the Mayor and City Council of the City of Cape Girardeau, Missouri; and the unknown heirs at law, devisees and alienees of L. Lorimier, Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier, Thomas S. Rodney, Thomas Jefferson Rodney, Polly Rodney, Augustus B. Lorimier and Raphael V. Lorimier.

It is contemplated that compensation for the taking of the land shall be made by conveyance of the present federal building to the City of Cape Girardeau, subject to the reservation to the Government of possession of the present federal building until the completion and occupancy of the new building, subject, however, to the right of the City of Cape Girardeau to use and occupy the courtroom and two rooms on the third floor of the present federal building from the date title to the new site vests in the United States to the date of vacation by the Government of the present building, provided such occupancy by the city is without expense to the Government and does not interfere with the governmental activities. After judicial deter-

mination of the just compensation in the proceeding, a deed conveying the present federal building site to the city will be obtained and forwarded to you.

Unless there shall be an adjudication in the proceeding that only the City of Cape Girardeau, Missouri, is entitled to compensation prior to the determination of the amount thereof, it will be necessary that the just compensation payable for the taking of the land shall be determined in accordance with your local procedure. In this event the commissioners' award may be restricted to an award of no compensation or compensation in a nominal amount by submitting evidence of the proposed conveyance to the city of the present federal site and testimony by the city officials that the exchange is fair and advantageous.

Should the court find as a matter of law and fact that only the city is entitled to compensation, the proceeding may be concluded by stipulation with the city.

Please give this matter your continued attention and keep the Department advised of all developments.

Respectfully,

For the Attorney General
J. EDWARD WILLIAMS,
Acting Head, Lands Division.

Enc. No. 424424.

[fol. 111] Mr. Cooper: Now we desire to have marked "U. S. Exhibit 7" and offer in evidence a letter from the Department of Justice to Mr. Blanton, dated July 23, 1943, requesting to file an amended petition.

Mr. Kelso: We adopt the objections heretofore made to the exhibits, and in addition thereto object to this letter because there is no reference in the pleadings anywhere to a joint committee on Public Buildings being authorized to make any selection or recommendation. And the major portion of the letter is merely a matter of argument as to the law and the method of procedure and the view of the writer as to the competency of the evidence.

The Court: I will hear it.

(Counsel reads "U. S. Exhibit 7" to and including the words "Case No. 420, Iska W. Carmack vs. United States of America, decided April 26, 1943," where the following occurred):

Mr. Cooper: Then appears a paragraph which is immaterial here. Unless Your Honor wants it read I will omit it. Then follows the amended petition which I will read. Then there are matters relative to the case in the Circuit Court of Appeals which I will be glad, if the Court cares, to read it, but to save time I am omitting it.

The Court: I suggest you pass up that part.

Mr. Kelso: May I inquire, was the whole letter offered? There were portions omitted?

Mr. Cooper: The whole letter is offered, yes, sir, at this time.

[fol. 112] (United States Exhibit 7 — 4/18/44 AP.)

Address Reply to
"The Attorney General"
and Refer to
Initials and Numbers
RJL—BJH.
33-26-210

Department of Justice
Washington, D. C.

July 23, 1943.

Mr. Harry C. Blanton
United States Attorney
St. Louis, Missouri

Dear Mr. Blanton:

Reference is made to Case No. 482 Civil in the Southeastern Division of your District, a suit to condemn land for a Post Office Site at Cape Girardeau, Missouri, which on appeal, was Case No. 12420, Iska W. Carmack v. United States of America, decided April 26, 1943.

You are advised that the Solicitor General has decided that application should not be made for a writ of certiorari.

Please amend the petition to specifically allege that the Postmaster General joined with the Federal Works Ad-

ministrator in the selection of the City of Cape Girardeau, Missouri, for the erection of a post office and custom house building and jointly selected the site therein, pursuant to existing law (Title 40, U. S. C. A., Section 341). It will be recalled that the Joint Committee on Public Buildings, appointed by the two officials, recommended the selection of the site involved in the condemnation proceeding, but the joint approval was not formally made in writing until recently. This joint approval appears on the last page of the report of M. J. Deutsch, Post Office Inspector and Site Agent, a certified copy of which is enclosed.

It will be recalled that the Circuit Court of Appeals held that right to determine what is a public use and when there is a public necessity for taking specific property is, in the first instance, a legislative rather than a judicial question, but whether in carrying out the purpose of Congress the officer has acted capriciously or arbitrarily is a judicial question, and that this issue should have been determined by the District Court. This Department feels that this issue should be raised by the defendant, testimony taken if the Court desires it, and the question decided by the Court. It also appears to this Department that the best evidence to offset the contention that the selection was arbitrary or capricious is the report made by M. J. Deutsch, dated August 20, 1940. This report indicates that [fol. 113] at least twenty-two sites were considered and appraised, and that the advantages and disadvantages of each proposed site was set forth in the report. Mr. Deutsch recommended one of two sites and the site being acquired was his second choice. The Joint Committee on Public Buildings recommended the site being acquired and this was subsequently approved. The Department has been advised that Mr. Deutsch is now in the United States Army and will not be available to testify. However, a certified copy of this report may be used as evidence. It will also be noted from the report that at least six persons made appraisals of various sites under consideration, and in many instances, six appraisals were made of one site. It may be advisable to use some of the appraisers as witnesses, particularly, William Deevers, who made thirteen appraisals, and at the time stated that he would be willing to testify. The names of the appraisers are shown at Page 5-A of Mr. Deutsch's report.

Also enclosed is a certified copy of the Joint Selection by the Postmaster General and the Federal Works Administrator of the site being acquired in this proceeding. It is dated June 10, 1943.

A certified copy of a letter dated October 9, 1940, from H. Arthur Tucker, Associate Architect, to Mr. Louis A. Simon, Supervising Architect, Public Buildings Administration of the Federal Works Agency, is also enclosed, which may be of use to you in the proceeding. Please take the necessary steps to have this case set for hearing and conclusion.

Respectfully,

For the Attorney General
NORMAN M. LITTELL,
Assistant Attorney General.

Enclosure No. 830446.

[fol. 114] Mr. Cooper: Your Honor, to save time, I desire to offer the order of the Court made, giving us leave to file the original petition, in the files in this case. It was signed by Judge Collet.

[fol. 115] Order For Leave To File Petition, For Issuance Of Summons And That Rule No. 4 Of The New Rules Of Civil Procedure Is Not Applicable

In The United States District Court
Eastern District Of Missouri
South-Eastern Division

United States of America, Plaintiff,
Docket No. 482 vs. At Law
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and the City of Cape Girardeau, Missouri, a Municipal Corporation, et al., Defendants.

On Motion of the plaintiff for leave to file the petition in the above designated proceeding, leave is hereby granted and the petition ordered filed.

It Is Hereby Further Ordered and Directed that the Clerk of this Court shall issue summons and notice to each of the defendants named in the petition to appear before

the Judge of this Court at the United States Court House in the City of Cape Girardeau, State of Missouri, on the 8th day of December, 1941 at 10:00 in the forenoon, then and there to answer the petition of the United States of America, at which time and place said petition will be heard;

And It is Further Ordered and Directed that inasmuch as this is a proceeding for the condemnation of property under the power of eminent domain, the procedure for the service of summons and notice is not governed by Rule No. 4 of the New Rules of Civil Procedure; that said rule is not applicable; and that Plaintiff is authorized to follow its former practice.

Dated this 21st day of November, 1941.

GEO. H. MOORE,
United States District Judge.

Endorsed: Filed: Nov. 22, 1941, Jas. J. O'Connor, Clerk.

[fol. 116] Mr. Cooper: Next desire to offer the order of leave to file the amended petition, signed by Judge Collet on August 12, 1943.

[fol. 117] Order For Leave to File Amended Petition

In The United States District Court
Eastern District of Missouri
Southeastern Division

United States of America, Plaintiff,
Docket No. 482 vs. At Law
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and the City of Cape Girardeau, Missouri, a Municipal Corporation, et al., Defendants.

On oral motion of Plaintiff for leave to file the amended petition in the above designated proceeding, leave is hereby granted and the petition is ordered filed.

Dated this 12th day of August, 1943.

J. C. COLLET,
United States District Judge.

Endorsed: Filed: August 14, 1943. Jas. J. O'Connor, Clerk.

[fol. 118] Mr. Cooper: I now desire to offer order granting leave to amend the petition, signed by Judge Moore on the 5th of December, 1941.

[fol. 119] Order For Leave to Amend Petition

In The United States District Court
Eastern District of Missouri
Southeastern Division

United States of America, Plaintiff,
Docket No. 482 vs. At Law
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and the City of Cape Girardeau, Missouri, a municipal corporation, et al., Defendants.

On motion of the United States of America, plaintiff herein, by its attorney, Harry C. Blanton, United States Attorney, plaintiff is granted leave to amend its petition filed herein on November 22, 1941, by striking the word "plat" where it appears in the 4th line of the land description on page 5 of the body of the petition and inserting in lieu thereof, the word "place".

Dated this 5th day of December, 1941.

GEO. H. MOORE,
United States District Judge.

Endorsed: Filed: December 6, 1941, Jas. J. O'Connor, Clerk.

[fol. 120] Mr. Cooper: I now desire to offer in evidence certified copy of a deed made by L. Lorimier, dated the 13th day of January, 1806, recorded in Books A and B, at page 118. That deed is also recorded in Book B at page 15.

The Court: Do you have the copy of the deed dated January 13, 1806?

Mr. Blanton: January 13, 1806, yes, sir. There was an original record at 15, and for some reason rerecorded.

Mr. Cooper: The date of the deed is 1807 and made pursuant to proposal of the 13th of January, 1806. That has been marked "U.S. Exhibit 1" in the former trial. I will ask that it be marked "U. S. Exhibit 8". (The document is marked as requested)

Mr. Kelso: Same objection as to the offer before, adopting the objections to the offerings.

The Court: I suggest that you dispense with the reading of it, and I will read it when I take this case under advisement, unless there is something particular at this time.

Mr. Cooper: There is nothing in this deed that I care to refer to, Your Honor. Shall I hand it to Your Honor or leave it in the file?

The Court: Leave it with the other exhibits. May it be understood all the exhibits are to be left with the Clerk in this case?

[fol. 121] (United States Exhibit 8 — 4/18/44 AP.)

Territory of Louisiana
District of Cape Girardeau.—Sct.

Louis Lorimier
To The
District of Cape Girardeau

Wheeas on the 13th day of January 1806, in my proposals for having the seat of Justice, of this District parmanently fixed on my land at this place. I have promised & agreed to convey four acres of land to the District for the purpose of erecting the Public buildings thereon, in consequence whereof, and of the acceptation of the Court; the said four acres have been laid off in a place, and in a manner approved of, by the Commissioners appointed for that purpose, and public buildings. (Viz' A Court House and a Prison have been erected on the same. Therefore in compliance with that part of my said pro-

posals, and at the request of the present Board of Commissioners and Assessors, in, and for the District aforesaid. I do hereby Give, Grant, Alien, Convey and Confirm unto the said Commissioners, and Assessors, in behalf, and for the use of the District of Cape Girardeau, the aforesaid four acres of land situate in this Town of Cape Girardeau bounded on the East by Spanish Street, on the West by Lorimier's Street, and divided into two equal parts, by Themis's Street, each moiety having three hundred and Seventy Six feet, three inches in (in) length (East and West); by two hundred and thirty one feet Six inches, and a half, in breadth, the said four acres of land so given, to be and remain forever, Common and Public and never to be appropriated to private use, agreeably to the explisit intention of the Donor; under which limitations & conditions above expressed, I for myself, and my heirs, the said four acres of land, and all their appurtinances, I do presently co vey, and deliver unto the said Commissioners & Assessors in behalf of the District forever, in fee simple, and the same, I for myself, my heirs &c. unto them and their successors in office under the Stipulations aforesaid, against the claim of all persons, claiming, from, by, or under me, and of all persons whatever; do hereby Warrant & will forever Defend.

In Testimony Whereof I have hereunto set my hand and seal at Cape Girardeau, this twenty ninth day of July in the year of our Lord, one thousand Eight Hundred & Seven;

(Test) B. Cousin L. Lorimier (Seal)

District of Cape Girardeau. Set.

This day Bartholomew Cousin personally appeared before me, a Justice of the Court of Common Pleas, of the District aforesaid, and made oath that Louis Lorimier Signed, Sealed & acknowledged the foregoing deed of conveyance in his presence. Given under my hand at the Town of Cape Girardeau, in the said District, this 29th day of July, in the year 1807.

210 Received & Recorded the 13th day of Augus 1807 & examined % EDWd F. Bond Recor

[fol. 122] In The Recorder's Office, City of Jackson, County Seat of Cape Girardeau County

State of Missouri,
County of Cape Girardeau.—ss.

I, E. W. Hink, Recorder, within and for the County of Cape Girardeau, do hereby certify that the above and foregoing is a full, true and complete copy of the RECORDED INSTRUMENT "LOUIS LORIMIER to THE DISTRICT OF CAPE GIRARDEAU" as full, true and complete as the same remains of record in my office in BOOK A & B at pages 117 and 118

In Testimony Whereof I have hereunto set my hand and affixed the seal of my office.

Done at my office in the City of Jackson, this 12 day of FEBRUARY 1942

By J. K. WELLS, Deputy E. W. HINK, Recorder

Seal
Recorder of Deeds
Cape Girardeau County
Mo.

[fol. 123] Mr. Cooper: I next ask the reporter to mark "U. S. Exhibit 9," I believe it is, and offer in evidence a deed dated the 26th day of March, 1814, executed by Robert Green, Isaac Shepard and William Kelso, as trustees of the Court of Common Pleas of the County of Cape Girardeau to the heirs of Louis Lorimier, deceased.

The Court: That is the deed conveying the same property back to the Lorimiers?

Mr. Cooper: Yes, sir. I don't care to read that in evidence unless your Honor cares to hear it, except I want to call the Court's attention to the fact that it excepts therefrom the Court house and jail thereon erected, which are to be sold for the benefit of the County and removed. It shows an exception in case of the library building in this case.

Mr. Kelso: I adopt the objections heretofore made to the offering of exhibits in this case, and make the further objection that the title to the property did not pass by the deed of 1814 for the reason that the Court referred to as the grantors had no authority either express or implied to make any conveyance of any kind, and had no control or custody whatever of the property conveyed.

The Court: Your objection is that the grantors had no title to convey?

Mr. Kelso: They had no right to convey, either. They had no right to convey at all. It was a court that had no [fol. 124] power to do anything of that kind.

The Court: I understand. Overruled.

[fol. 125] (United States Exhibit 9 — 4/18/44 AP.)

Whereas on the 29th day of July 1807 Louis Lorimier did sign and execute a deed to the Commissioners & assessors in & for the district (now County) of Cape Girardeau in behalf and for the use of said district for four acres of land situate in the town of Cape Girardeau, bounded on the east by spanish street, and on the west by Lorimier's street and divided in two equal parts by Themis's street each moiety having 376 feet 3 inches in length (east & west) by 231 feet 6½ inches in breadth, as designated in said deed, under the condition therein expressed, that the said town of Cape Girardeau should be & remain the permanent seat of Justice of said district (now County) and whereas by a declaration of the present Commissioners of the Court-house & Jail of said County dated the 17th November 1813, and their subsequent proceedings the seat of Justice has been removed from said Town of Cape Girardeau.

Therefore we the undersigned: Robert Green, Isaac Shepard, and William Kelso—Judges of the Court of Common Pleas of the County of Cape Girardeau do hereby in behalf and in the name of said County release, quit claim, resign, relinquish & deliver unto the heirs of said Louis Lorimier deceased the aforesaid four acres of land situate as aforesaid with all their appurtenances (except the Court-house & Jail thereon erected which are to be sold for the benefit of the County and removed) together with

all the interest, claim, demands title and right whatever of said County in, over and to the same four acres and every part & parcel thereof—

In testimony whereof we the above named have hereunto set out hands & seals in open Court at the meeting house on the plantation of Thomas Bulb, this twenty sixth day of March in the year of our Lord one thousand eight hundred and fourteen.

Witnesses present	ROBT. GREEN,	(Seal)
David Green	ISAAC SHEPARD,	(Seal)
Morgan Bryne	WILLIAM KELSO	(Seal)
C. B. Cousin		
John Klaus		

Territory of Missouri,
County of Cape Girardeau—ss.:

Be it remembered that on the 26th day of March 1814 the above named Robert Green, Isaac Shepard & William Kelso personally appeared before me George Henderson a Justice of the peace within and for the County aforesaid and duly acknowledged the foregoing as containing their acts and deeds for the purpose within mentioned as witness my hand,

GEORGE HENDERSON, J. P.

Seal .....a. 50.00
fees—recording 4-4/5 sheets of recording at 5..a. 6½. a
certificate and seal.....a. 20. a

1.33. a

Received 26 March 1814 and Recorded.

JOSEPH McFERRON,
Clerk of the Court of Common Pleas.

In the Recorder's Office, in the City of Jackson, County Seat of Cape Girardeau County.

State of Missouri,
County of Cape Girardeau—ss.:

I, E. W. Hink, Recorder, within and for the County of Cape Girardeau, do hereby certify that the above and foregoing is a full, true and complete copy OF THE RE-

CORDED INSTRUMENT EXECUTED BY "ROBT. GREEN, ISAAC SHEPPARD & WILLIAM KELSO" Judges of the Court of Common Pleas, To LOUIS LORIMIER as grantee; as full, true and complete as the same remains of record in my office in Book "C" at Pages 442-3.

In Testimony Whereof I have hereunto set my hand and affixed the seal of my office. Done at my office in the City of Jackson, this 12th day of FEBRUARY, 1942.

E. W. HINK,
Recorder.
By J. K. Wells,
Deputy.

[fol. 126] Mr. Cooper: I now desire to have marked "U. S. Exhibit 10" and offer in evidence a deed dated September 11, 1820, from the Lorimier heirs to the inhabitants of the Town of Cape Girardeau.

I would like to read that deed to the Court calling his particular attention to certain phases of it without argument, Your Honor.

Mr. Kelso: Defendant Carmack, in addition to adopting the objections heretofore made to introducing exhibits and to this particular exhibit, wants to urge as ground for the objection that this is the deed that was passed upon by the Supreme Court of the State of Missouri in which it held that the City of Cape Girardeau had no authority to convey, and only acquired the title as trustee with authority to regulate. I shall not argue that.

The Court: The previous deed conveyed no title, so they had no authority to transfer back?

Mr. Kelso: The Supreme Court held without questioning this deed, conceding the validity of it, notwithstanding the fact that the deed may be in every way sound.

Mr. Cooper: Before reading the deed, I would like to say to the Court that I think the deed shows on its face that Mr. Kelso is misconstruing the deed. That is the part I want to call to the Court's attention.

The Court: I will read the deed. You may read it if [fol. 127] you want at this time.

(U. S. Counsel reads the deed, U. S. Exhibit 10, to and including paragraph 4, when the following occurs):

Mr. Cooper: Now there is the first time that any property is dedicated to a particular purpose. That is the streets and alleys.

(U. S. Counsel then reads paragraphs 5 and 6, when the following occurs):

Mr. Cooper: Now there is a particular use in there, an outlet to the street.

(U. S. Counsel reads paragraph 7, when the following occurs):

Mr. Cooper: That it shall be dedicated to the Roman Catholic Church. Now there is a specific use. "Which lot is destined for a public school." Another specific use. "Together with all and singular the right, title and interest," etc. "Shall be appropriated to the public uses for which they are intended."

Mr. Kelso: May I state in answer to the arguments made in reading the deed that the United States Circuit Court of Appeals has expressly passed on the fact that the undisputed evidence in this case shows that the property sought to be condemned is devoted to public use, has been devoted to public use for more [that] 100 years and that that is not a matter that can be tried by this Court at this time.

The Court: I understand. They also held those deeds were conveyances, too, didn't they? These deeds that you [fol. 128] are objecting to?

Mr. Kelso: There was only one thing they said, they said that deed, that Court in answer to our contention that it was not a deed, they said that it was in form a quit-claim deed.

The Court: They used the term "conveyance," that the land was conveyed to Lorimier heirs and back.

Mr. Kelso: Well, conceding that the deed is perfectly good, the Circuit Court of Appeals held that the property

therein described was vested in the City as a trust and that they maintain that public property not because they sought or wanted to do so but because they were obligated under the deed of dedication to so do.

The Court: I have read that paragraph.

Mr. Kelso: Well, that was in answer to his argument.

The Court: Yes, sir.

[fol: 129] (United States Exhibit 10 — 4/18/44 AP.)

Be it remembered That the undersigned Heirs and legal representatives of Louis Lorimier deceased, namely Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier and Thomas S. Rodney as Guardian of Thomas Jefferson Rodney and Polly Rodney, for and in consideration of the sum of One Dollar the receipt whereof is hereby acknowledged, and for Divers other good considerations and more particularly for the convenience and encouragement of the Inhabitants of the Town of Cape Girardeau and Owners of Lots in or near the same, have given, granted, sold, aliened, quit-claimed and conveyed, and they do hereby give, grant, sell, alien, quit-claim, convey and confirm unto the inhabitants of the Town aforesaid collectively, for their use, benefit and behoof forever, the several Lots or parcels of land hereinafter described, viz, 1°. The place known and designated in the plan of said Town, as the Public Square, bounded on the East by Spanish Street, and on the West by the Street of Independence in Ranges C & D, as originally laid off and Containing four acres.—2dly. Lot No. Twenty-two in Range C, bounded Westwardly by a Street Sixty feet wide, and on the South by the Street of Independence, including a Spring—3°. Lot No. Twenty-two in Range A bounded on the West by Fountain Street and on the South by Williams Street.—4°. all the vacant space between the river Mississippi and the front of Ranges A, B, G and H, designated on the map by the name of Front Street or, Aquamsi; and generally all the ground appropriated to Streets and alleys throughout the whole Town, as represented in the plan thereof.—5°. The space on the river above the town, in front of Outlot No. One, containing two acres and a half, more or less.—6°. a hundred feet

square in Outlot No. Two and adjoining North Street, so as to afford a convenient access to the Spring used in that part, and to include said Spring. 7°. Six acres of land (as laid off in the Map of Outlots) situated part in Outlot No. Two, and part in Outlot No. Thirty two, and now used as a Grave Yard; with the condition that the Western half thereof shall be and remain appropriated to the Roman Catholic Church 8°. an Outlot Marked (h) containing about three acres and a quarter, bounded Eastwardly by Pacific Street, and Westwardly by John Scripps's purchase of six acres, on the North by Outlot (I) and on the South by Outlot (i), which Lot, including a larg Spring, is destined for the establishment of a Public School.—Together with all and Singular the right, title, claim, and interest whatsoever of them the said Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier, and Thomas Jefferson Rodney and Polly Rodney, and their heirs forever unto the several Lots or parcels of land above enumerated and described and all appurtenances belonging to the same.—Provided always that the several tracts or parcels of Land thus granted to the Town of Cape Girardeau and the Citizens Thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property.

In Testimony Whereof the said Louis Lorimier, Daniel F. Steinbeck (in right of his wife Agatha, and as assignee of Augustus B. Lorimier and of Raphael V. Lorimier) Victor Lorimier and Thomas S. Rodney as Guardian and representative of his minor children aforesaid by his first wife Maria Louisa deceased, have hereunto set their hands and seals this eleventh day of September in the year of Our Lord One Thousand eight hundred and twenty.

[fol. 130] Signed, Sealed and acknowledged in the presence of B. Cousin.

LOUIS LORIMIER, (Seal)
D. F. LORIMIER, (Seal)
VICTOR LORIMIER, (Seal)
THOS. L. RODNEY, Guardian. (Seal)

Territory of Missouri,
County of Cape Girardeau—ss.:

Before me William Kelso a Justice of the Peace in and for the County aforesaid, personally appeared the above named Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier and Thomas S. Rodney and severally acknowledged the foregoing instrument of writing to be their Act and Deed for the purposes therein mentioned.

Given under my Hand and Seal this eleventh day of September 1820.

WILLIAM KELSO (Seal)
Justice of the Peace.

Received 12 September 1820 and Recorded.

JOSEPH McFERRON,
Clerk of the Circuit Court.

Tax	50 "
fees Record 7-2/10 Shts. of 100 Wd. o 15	1.08 "
Certif. and Seal	20 "
	1.78

Recorder's Office, in the City of Jackson, County Seat of Cape Girardeau County.

State of Missouri,
County of Cape Girardeau—ss.:

I, E. W. Hink, Recorder, within and for the County of Cape Girardeau, do hereby certify that the above and foregoing is a full, true, and complete copy of the INSTRUMENT wherein the LEGAL REPRESENTATIVES of LOUIS LORIMIER, deceased, as GRANTORS, conveyed to the INHABITANTS of the TOWN OF CAPE GIRARDEAU, as GRANTEE; properties as described therein, as full true and complete as the same appears of record in BOOK "E" PAGES 496-7-8.

In Testimony Whereof I have hereunto set my hand and affixed the seal of my office. Done at my office in the City of Jackson, this 12th day of FEBRUARY, 1942.

Seal
Recorder of Deeds
Cape Girardeau County,
Mo.

E. W. HINK,
Recorder.
By J. K. Wells,
Deputy.

[fol. 131] Mr. Cooper: Next desire to offer in evidence, Your Honor, an Act of the General Assembly of the State of Missouri, Laws of Missouri 1843, at page 168 and following, passed and approved February 24, 1843, being an Act of Incorporation of the City of Cape Girardeau. We desire to offer the whole Act, but call the Court's particular attention to Section 19 thereof.

Mr. Kelso: Now at this time I want to adopt the same objection that we have made to the introduction of that document.

The Court: Well, overruled.

Mr. Cooper: Section 19 reads as follows, Your Honor:

"All property, real and personal, heretofore belonging to the inhabitants of the Town of Cape Girardeau, or the trustees thereof in their corporate capacity, shall be and is hereby declared to be vested in the corporation, and all suits commenced for and on behalf of the trustees shall be prosecuted to judgment and execution as if this Act had not been passed; and all moneys arising therefrom and all fines, penalties and forfeitures accruing to such trustees shall be paid into the treasury of the City for the use of the City, and all ordinances now in force shall remain in force as ordinances of said City until altered, modified or repealed by the said Mayor and Councilmen. All actions, fines, penalties and forfeitures which shall accrue, or may accrue, to the Town of Cape Girardeau shall be vested in and be prosecuted for, in the name of the corporation created by this Act."

[fol. 132] Mr. Cooper: Now we desire to offer in evidence files, a disclaimer I believe, filed by the County of Cape Girardeau by its County Court, one of which disclaimers is filed pursuant to service of process under the original petition; the other disclaimer is filed pursuant to service of the amended petition in this case, Your Honor.

The Court: What have those disclaimers got to do with this case?

Mr. Cooper: It simply shows that the County of Cape Girardeau makes no claim.

The Court: Well, the petition or answer alleges they do.

Mr. Cooper: The petition alleges that they may have.

Mr. Blanton: They remain parties defendant pursuant to the instructions of the Attorney-General, Your Honor.

The Court: Very well.

Mr. Kelso: I want to add the further objection that there is nothing offered to show that the County Court acted by resolution or otherwise as it was required to do to authorize anyone to file a disclaimer. There is no authority to show that.

Mr. Cooper: The first disclaimer mentioned was filed March 24, 1942, Your Honor; and the second disclaimer mentioned was filed August 26, 1943 in this case.

[fol. 133] Act Of Incorporation Of City Of Cape Girardeau

Twelfth General Assembly, 1843
Laws Of Missouri, 1843, Page 168, et seq.
Passed And Approved, February 24, 1843

(Index Omitted)

#482.

Cities

Cape Girardeau.

An Act to incorporate the city of Cape Girardeau.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Sec. 1. All that district of country within the following limits, to-wit: Beginning at a point in the main channel of the Mississippi, opposite to where North street, as designated on the plat of said town, would intersect the same; running thence, westwardly, with said street, to Pacific street; thence, southwardly with Pacific street, to the south-west corner of lot number fifteen; thence eastwardly, to the southern boundary of lots number fifty-six, fifty-three, forty-one, forty-eight, and forty-five, to the south-west corner of lot number forty-five, as designated on the plat

of said town; and thence southwardly, with an alley running between lots number forty-three and forty-four, and out lot number seventeen, to Street Morgan's Oak; thence eastwardly, with said street, until it intersects middle street; thence southwardly, with said street, to the south-west corners of lots number twenty-one, twenty-eight, twenty-four, nineteen, eighteen, eight and seven, to the middle of the main channel of the Mississippi; and thence, northwardly, with the middle of the main channel thereof, to the beginning, shall be and is hereby erected into a city, by the name of the city of Cape Girardeau: and the inhabitants thereof shall be and they are hereby constituted a body politic and corporate, by the name and style of the "mayor, councilmen and citizens of the city of Cape Girardeau," and by that name and style, they and their successors shall be known in law; have perpetual succession; sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity, and in all actions and matters whatsoever; may grant, purchase and hold property, real and personal, within said city, but no where else, (burial ground excepted,) and may lease, sell and dispose of the same for the benefit of the city; and may do all other acts as natural persons; may have a common seal, and break and alter the same at pleasure.

Sec. 2. The corporate powers and duties of said city shall be vested in a mayor and councilmen, who shall be chosen, as hereinafter provided.

Sec. 3. The board of councilmen shall consist of seven members, for the election of whom the city shall be divided into convenient wards, which may be altered from time to time, and new wards created as, the convenience of the inhabitants may require; and said councilmen shall be appointed among the several wards, in proportion to the number of free white male inhabitants thereof, each ward having, at least, one member in the council.

[fol. 134] Sec. 4. Said councilmen shall be chosen by the qualified electors of said city, and shall hold their office for the term of one year: they shall have all the qualifications as are required for the members of the legislature, and shall have been inhabitants of said city, at least one year next preceding their election.—Whenever there shall be a

tie in the election of councilmen, it shall be determined by the judges of the election of the ward in which it shall have happened, by lot, and (at) the first election, it shall be determined as aforesaid by the judges of the election: and should any vacancy occur in said board it shall be filled as aforesaid, in such manner as shall be provided by ordinance.

Sec. 5. The board of councilmen shall judge of the qualifications, elections and returns of members, and a majority of whom shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as the board may provide; they may determine (the rules) of their proceedings, punish their members for disorderly conduct, and, by the concurrence of two-thirds of the whole number elected, expel a member, but not a second time for the same offense, and they shall, on motion of any member, cause the yeas and nays to be entered on the journal.

Sec. 6. The mayor of said city shall, be ex-officio, president of the board of councilmen, who, with the advice and consent of the councilmen, shall appoint all other officers of the board not otherwise chosen.

Sec. 7. A general election for mayor and common councilmen for said city, shall be held on the first Monday of April, in the year of our Lord eighteen hundred and forty-three, and on the first Monday of April in each and every year thereafter; and, on the first Monday of May in the year aforesaid, said mayor and councilmen shall hold their first meeting and forever thereafter shall hold their stated meetings on the first Mondays of May, August, November and February, in each and every year.

Sec. 8. The mayor and councilmen shall, at their said first meeting, proceed to lay off said city into convenient wards under this act, and do any other act, within the scope of their authority, that they may think proper. Provided, no such action shall vacate the seats of the councilmen first elected under this charter, but may change the time of holding their stated meetings at pleasure.

Sec. 9. The mayor shall be annually elected, as aforesaid, by the qualified electors of said city, shall hold his office for one year, and until his successor shall be elected and qualified; and when two or more persons shall have an equal number of votes for mayor in any election for said office, it shall be determined by the councilmen, and such mayor shall be at least, thirty years of age, a citizen of the United States, and shall have resided, at least, two years within said city next preceding the time of his election, and shall moreover have the qualifications as prescribed in the case of councilmen.

Sec. 10. The mayor shall nominate, and by and with the concurrence of the councilmen, appoint all officers within the city, which are not ordered, by law or ordinance, to be otherwise appointed: he shall take care that the laws of the State and the ordinances of the corporation are duly enforced within the city: he shall have power, with the consent of the board of councilmen, to remove from office any person holding office created by ordinance; he may remit fines and forfeitures: grant reprieves and pardons in any case arising under the ordinance of the corporation; he shall be conservator of the peace within [fol. 135] the limits of the city; he shall have power to fill all vacancies which may happen, in any office other than that of councilman, until the end of the session of the board of councilmen; he shall, from time to time, give to the board of councilmen information relative to the state of the city, and shall recommend to their consideration such measures as he shall deeem expedient; he may, on extraordinary occasions, convene the board of councilmen, by proclamation, stating to them when assembled, the object for which they were convened; and he shall receive such compensation for his services, as may be provided by ordinance.

Sec. 11. Said councilmen shall choose by ballot, from their body, a president, pro tem, who, in the absence of the mayor, or in the vacancy of the office of (mayor) happening by any means whatsoever, shall exercise the office of mayor and president of the board until such vacancy may be filled as aforesaid.

Sec. 12. The mayor and board of councilmen shall have power, by ordinance, to levy and collect taxes upon real and personal estate within the city not exceeding one half of one per centum upon the assessed value thereof, except as hereinafter excepted; to make regulations to prevent the introduction of contagious deseases; to make quarantine laws for that purpose, and enforce the same within the corporation limits of the city; to make regulations to secure the general health of the inhabitants; to prevent and remove nuisances; to establish night watches and patrols; erect lamps in the streets and light the same; to improve the navigation of the Mississippi, within the city limits; to erect repair and regulate the stationing, ancorage and mooring of vessels; to provide for licensing, taxing and regulating auctions, retailers, ordinaries, taverns, billiard tables, hackney carriages, wagons, carts drays, hawkers and peddlers, theatrical and other amusements; to restrain and prohibit tippling houses, gaming houses, bawdy houses and other disorderly houses; to establish and repair bridges; to establish and regulate markets; to open and keep in repair streets, alleys, avenues, lanes, drains and sewers, and keep the same cleared; to provide for the safe keeping of standard weights and measures to be used in said city; to regulate the cleaning of chimneys and fixing the price therefor; to provide for the inspection of lumber and other building materials to be sold and used within the city; to regulate the size of brick to be made and used within the city; to regulate and order parapet walls, and partition fences; to regulate the inspection of butter, lard, wood and the weight and quality of bread, the storage of gun powder, tar, pitch, rosin, hemp, cotton, and other combustible materials, to erect pumps in the streets for the convenience of the inhabitants; to regulate the police of the city; to regulate the election of city officers and fix their compensation; and, from time to time, to pass all such ordinances to carry into effect the object of this act, and the powers hereby granted as the good of the inhabitants may require, and to impose fines, penalties, and forfeitures for the breach of any ordinance, and provide for the collection thereof. Provided, that no tax shall be laid on the implements of any person, used in carrying on his trade or business, nor shall the same be subject to distress or sale for taxes.

Sec. 13. Upon the application of the holders of two thirds of the front of the lots along any street or part of street, it shall be lawful for the mayor and councilmen, to levy and collect a special tax on the holders thereof according to the assessed value of their respective fronts, exclusive of improvements, for the purpose of grading and paving such street or part of street, which shall be faithfully applied to such purpose, and to no other; and, upon a similar application, to levy a tax for the purpose of lighting the streets or erecting lamps therein, which tax, when collected, shall be applied to such purposes aforesaid.

[fol. 136] Sec. 14. The mayor and councilmen shall have power to regulate pave and improve the streets, avenues, lanes and alleys, within the limits of the city; and to extend, open and widen streets, avenues, lanes and alleys, making the person or persons injured thereby adequate compensation therefor; to ascertain which the mayor shall, in all such cases, cause to be summoned twelve good and lawful men, freeholders, inhabitants of said city, not directly interested, who (first being duly sworn for that purpose) shall enquire into and take into consideration, as well, the benefit as the inconveniences which may accrue, and estimate and assess the damages, which would be sustained by reason of the opening extension or widening any street, avenue, lane or alley, and shall moreover estimate the amount which other persons will be benefited thereby, and shall contribute toward compensating the person injured thereby; all of which shall be returned, to the mayor under their hands and seals; and the person or persons who shall be benefited, and so assessed, shall pay the same, in such manner, as shall be provided by ordinance, and the residue, if any shall be paid out of the city treasury.

Sec. 15. Every bill which shall have been passed by the board of councilmen, shall, before it becomes a law, be presented to the mayor for his approval: if he approve, he shall sign it, if not, he shall return the same with his objections, and they shall reconsider the same, and, if after such reconsideration, a majority of the whole number elected shall pass the bill, notwithstanding such objections, it shall become a law; in all such cases, the yeas and nays shall be

entered on the journals. If any bill shall not be returned to the board within three days after it may have been delivered to the mayor, it shall become a law, in the same manner as if he had approved it.

Sec. 16. The style of the laws and ordinances of said corporation shall be, "Be it ordained by the mayor and councilmen of the city of Cape Girardeau," and all ordinances shall, within one month after they are passed, be published in some newspaper printed in said city, or county of Cape Girardeau.

Sec. 17 There shall be appointed, as heretofore provided, a secretary of the board of councilmen, who shall hold his office for one year, and until his successor be qualified, unless sooner removed. Before he enters upon the duties of his office, he shall take and subscribe the oath hereinafter provided, and shall give bond, with sufficient security, to be approved by the mayor, conditioned for the faithful performance of his duties. The board shall cause a faithful record to be kept of their proceedings, to be kept by their secretary, which shall, at all convenient times be opened for the inspection of the inhabitants of the city; and said secretary shall safely keep and preserve, in his office, all records, public papers and documents of the city, and shall perform such duties enjoined on him by ordinance.

Sec. 18. The mayor, councilmen and other officers of the corporation shall, before entering upon the duties of their offices, respectively, take an oath or affirmation, before some judge or justice of the peace, to support the constitution of the United States and this State, and faithfully to demean themselves in office.

[fol. 137] Sec. 19. All property, real and personal, heretofore belonging to the inhabitants of the town of Cape Girardeau, or the trustees thereof in their corporate capacity, shall be and is hereby declared to be vested in the corporation; and all suits, commenced for and on behalf of the trustees, shall be prosecuted to judgment and execution, as if this act had not passed; and all the moneys arising therefrom, and all fines, penalties and forfeitures accruing to said trustees, shall be paid to the treasurer of the city, for the use of the city: and all ordinances, now in

force, shall remain in force as ordinances of said city, until altered, modified or repealed by said mayor and councilmen. All actions, fines, penalties, (and) forfeitures which shall have accrued, or may accrue, to the town of Cape Girardeau, shall be vested in and be prosecuted for, in the name of the corporation created by this act.

Sec. 20. All free white male inhabitants of said city, and who may have paid a city or corporation tax, be twenty-one years of age, and who may have resided twelve months within said city or corporation thus formed into a city, next preceding the election, and all free white persons residents of this State, of twenty-one years of age, who may own or possess and real estate within the limits of the city, or who shall have paid a city or corporation tax as aforesaid, shall be entitled to vote at all elections for city officers, either in person or by proxy, and all such elections shall be by ballot.

Sec. 21. At each general election for city officers, there shall be elected an assessor for said city, who shall possess the same qualifications, as required of councilmen, whose duty shall be prescribed by ordinance.

Sec. 22. The constable of Cape Girardeau township shall be, ex officio, constable of the city, who shall appoint and keep in office a suitable deputy within said city, one of whom shall attend the meetings of the board, execute the orders thereof, execute and return all process issued by the mayor as in other cases of writs issued by any other court, and shall perform such duties as may be prescribed by ordinance, and shall be entitled to the same compensation for the service and return of process as in other cases.

Sec. 23. The mayor and board of councilmen shall have power, by ordinance, to license and regulate ferries within the limits of the city.

Sec. 24. When any real estate shall be advertised for sale, or which may have been sold by the authority of the corporation, the owner or owners thereof may redeem the same, within two years, by paying the full amount of taxes and costs due thereon, together with ten per centum per annum on the principal sum.

Sec. 25. It shall be the duty of the mayor and board of councilmen, and they are required to cause to be made out, in a round plain hand writing, a full and complete statement of all moneys received and expended during the preceding year, and on what account received and expended, a copy whereof shall be published in said city or county, in such manner as may be provided by ordinance.

Sec. 26. The mayor and councilmen shall not expend more than one thousand dollars, annually, for the payment of the salaries of the mayor and other officers of said corporation; and the mayor shall receive for his services, annually, a sum not exceeding two hundred dollars, which shall not be increased or diminished during his term of service.

[fol. 138] Sec. 27. The mayor and councilmen, shall also have power to organize and establish fire companies in the city, and the members thereof shall be exempt from militia duty, in time of peace; and permit the organization of independent companies under their own by-laws and rules: and the members of said companies shall have the same privileges as those organized by the board.

Sec. 28. The mayor and each justice of the peace within the city shall have jurisdiction of all cases arising under this act of incorporation and the ordinances of the city, subject to an appeal or certiorari, as in other cases, to the circuit court of the county of Cape Girardeau (county,) and in like manner.

Sec. 29. The first election, as aforesaid, for mayor and councilmen, shall be held and conducted by the trustees of the town of Cape Girardeau, or any two of them, at such place in said town, as may by them be designated; which election shall be conducted according to the existing laws of the State regulating elections, and said trustees shall make and deliver, to each person elected, a certificate thereof.

Sec. 30. There shall be appointed, as hereinbefore provided a city treasurer, who shall hold his office for two years, if not sooner removed, or a vacancy occur, and, in that case, it shall be filled as aforesaid, and who, before he enters upon the duties of his office, shall take and sub-

scribe the usual oath, and give bond and security to be approved by the mayor, conditioned for the faithful performance of the duties of his office, in such penalty, as by ordinance, may be provided.

Sec. 31. All fines, penalties and forfeitures, arising from the breach of the peace, affrays, assaults and batteries, and the breach of any ordinance, except cases of felony, within the limits of said city, shall be paid into the city treasury, to be appropriated to the improvement of streets, lanes, alleys and such other objects, as, by ordinance, may be provided.

Sec. 32. No money shall be paid out of the treasury, unless in pursuance of appropriations made by ordinance.

Sec. 33. The General Assembly hereby reserves the right, at any time, to amend, alter or repeal this charter.

This act to take effect from and after its passage.

Approved, Feb. 24, 1843.

[fol. 139] Certificate.

I, W. C. Kaempfer, do hereby certify that I am the duly appointed and qualified City Clerk of the City of Cape Girardeau, Missouri; that the City of Cape Girardeau, Missouri is a third class city under the Laws of the State of Missouri and that it is operating under the Alternative Form of Government for Third Class Cities as provided for by the Statutes of Missouri.

In Witness Whereof, I have hereunto affixed my hand and the official seal of the City of Cape Girardeau, Missouri this 21st day of April, 1941.

W. C. KAEMPFER,
City Clerk.

(Seal.)
City of Cape Girardeau, Missouri.

[fol. 140] Mr. Cooper: We next desire to offer in evidence a portion of the deposition of E. R. Witman, taken by deposition on the part of Mrs. Carmack, beginning on page 53 of the deposition on file, line 16, as follows:

(Deposition).

E. R. Witman was thereupon called as a witness for the defendant Iska W. Carmack in above entitled cause, and oath having been waived as indicated hereinbelow, testified as follows:

Direct Examination.

By Mr. Kelso:

Thereupon, U. S. Counsel read the deposition from its beginning to and including the 2nd question and answer thereto on page 56 of deposition, as follows:

"Q. The money would be available to pay for any site you may select?"

"A. Yes, sir."

(Above deposition of E. R. Witman will be found on folio pages 428 to 447 of this transcript.

Mr. Cooper: Now if the Court please, I realize it is a little bit irregular, but we have Mr. Meyer, the Fourth Assistant Postmaster-General, here and we would like to offer him out of turn, if we may, so that he can get away. He is a very busy man and has to be in Chicago tomorrow.

The Court: Proceed.

[fol. 141] Walter Meyers of lawful age, produced, sworn and examined on behalf of the Government, testified as follows:

Direct Examination.

By Mr. Cooper:

Q. State your name, please.

A. Walter Meyers.

Q. What is your official position, Mr. Meyer?

A. Fourth Assistant Postmaster General.

Q. And how long have you been holding that position?

A. Since June 15, 1940.

Q. Now who was your immediate predecessor?

A. Smith W. Purdum.

Q. Do you know who was Commissioner of Public Buildings in June, 1940?

A. I do.

Q. Who was Commissioner?

A. W. E. Reynolds.

Q. Now I hand you a certified copy of a report made to the Federal Works Administrator and to the Postmaster General selecting Cape Girardeau, Missouri, for a new post office and Federal building, signed by Mr. Purdum and Mr. Reynolds in their respective positions, and ask you if that Mr. Purdum was your immediate predecessor?

A. He was.

The Court: Is that Exhibit 3?

Mr. Cooper: Yes, sir.

[fol. 142] Q. Now then, at the time you became Fourth Assistant Postmaster General, the City of Cape Girardeau had been selected for a new post office, custom house and court house building, but the site had not then been selected? Is that right? A. That is correct.

Q. Now Mr. Meyer, do you recall the selection of the site and the different meetings and so on that took place?

A. I do, in a general way.

Q. Now just explain to the Court, if you will Mr. Meyer, what for want of a better term I will call the "set-up" was, for the selection of the sites, the method of selecting the sites?

Mr. Kelso: To which defendant objects, that the setup would be a matter of regulation and cannot be proven in this way by this witness.

The Court: I understand he is asking this witness what was done.

Mr. Kelso: He asked the type of setup for selecting sites. I think that is by regulation which is written, and testimony of the witness would be improper.

The Court: I suggest you reframe the question. I do not so understand it.

Q. (Mr. Cooper) Will you just tell the Court then, Mr. Meyer, the method by which a post office site is selected?

Mr. Kelso: Wait a minute. That is the same question in another form; and the same objection. I have no ob-
[fol. 143] jection to witness stating what he did personally, or what he knows somebody else did personally,

but I do object to his undertaking to orally testify to the machinery setup under any regulation or any practice of that Committee.

The Court: Objection will be overruled at this time.

A. The Interdepartmental Committee for the selection of sites and approval of plans for buildings where post offices are involved, consists of the Commissioner of Public Buildings and the Fourth Assistant Postmaster General, each having been duly designated by superior officers. Mr. W. E. Reynolds—

Mr. Kelso: I do not want to interrupt the witness, but you cannot prove the duly instructed or duly authorized by any witness in that manner, and we insist on the objection.

The Court: I agree with you, but it is before the Court.

Mr. Kelso: I want to make my record.

A. Mr. W. E. Reynolds was at that time Commissioner of Public Buildings. I was the Fourth Assistant Postmaster General. We had present at our meetings Fiscal Manager of Public Buildings Administration, Mr. Ed R. Witman, and also the man who acted as secretary, Mr. Don Doyle, from my department; there was also the superintendent from my Division of Quarters, Joseph B. Beferly. We met for the consideration of such proposals as had been presented in pursuance of the advertisements that had been made. There were quite a number. My recollection is there were something like between 20 and 25. I expect it was 22. I am not positive about that.

[fol. 144] Those were carefully gone over by the Committee. And from that number there were five selected for further consideration. Then we went into those more in detail, and eventually out of the five we chose two. These selections were made after we had canvassed various reports that had been made by representatives of the Post Office Department and of the Public Buildings Administration. Does that answer your question?

Q. Now you finally, as I understand it, got the choice down to a selection between two sites by eliminating all of the other proposed sites? Is that right?

A. We did.

Mr. Kelso: The same objection, Your Honor.

The Court: Overruled.

Q. Now will you tell the Court what those particular sites were, Mr. Meyer?

A. The site upon which the present building is located and the site that we finally selected.

Q. Being the site being condemned here?

A. The site now in suit.

Q. Now the site referred to as the present building site. Was that just the site that the Government now owns, or was it that plus additional lands to be acquired?

A. That plus additional lands to be acquired.

Q. Do you recall what those additional lands were?

A. I couldn't give you the description of them. It was [fol. 145] land adjacent to the present building.

Q. Both on the east and south?

A. On the east and on the south. Both had been considered.

The Court: Vacant land?

A. Some of it was used and some of it was not, as I recall. I am not positive about that.

Mr. Cooper: Those details will appear in the report, Your Honor. But I might say on the south as I recall it, that is vacant land, about nine feet. And on the east it is this first building between here, the brick building between here and the Missourian Building, known as the Bremermann property.

Q. Now Mr. Meyer, will you tell the Court whether or not different conferences were held, whether or not different people were heard, different matters were considered in the selection of the site sought to be condemned here as between that site and the site of the present building, plus the additional property on the east and south.

Mr. Kelso: Object for the reason that the question is purely an argument and asks for a conclusion of the witness here.

The Court: Objection will be sustained.

Q. Just tell the Court what occurred relative to the selection of the site?

A. We had several meetings after the meetings of the Board at which there appeared interested parties. I [fol. 146] have a recollection at some time about the middle of September, I believe it was, of 1940 that Mayor Statler accompanied by Mr. Oliver, and I believe he was the City Attorney here, asked for a hearing with respect to the selection of a site. We met. They appeared before us and told us that they had a choice to submit to us, but they stated at the outset that there might be some controversy.

Mr. Kelso: Just a moment. I think, Your Honor, that it is improper for this witness in this ex parte manner to undertake to relate a conversation had with a member—with the City Counselor or the Mayor.

The Court: Overruled.

A. They told us that there might be some controversy about the matter and they desired us to know that in order that we might reach a conclusion without being influenced particularly by them. At a later time we learned that there was some controversy, and I believe in October near the middle or shortly afterwards, both parties appeared.

Q. What year was that?

A. In 1940. Both sides appeared. There was an attorney from Cape Girardeau whose name I am not sure about. I think it was Mr. Lowry.

Q. Frank Lowry?

A. I think that was the name. They came there on behalf of the City. Mr. Harry Himmelberger appeared. [fol. 147] They argued the matter out in much detail before us. And it was after that time that we had, I think one or two other meetings at which none of these parties were present, and we had about reached the conclusion that we would accept the site now in suit when we learned that there was a petition signed by certain citizens objecting to that choice. When that took place I suggested that inasmuch as they had asked for a hearing that we give a hearing to the other side. We wanted to know all that was to know before we made a selection.

Q. That is, the other side, you mean the ones who opposed?

A. The ones who opposed the present site in suit. It was a petition with several hundred names on it, as I recall. We gave consideration to that sometime in November. I believe it was along shortly after the middle Judge Kelso came to Washington and appeared before us in support of this petition against the selection of the site now in suit. It was after that time—well, it was just a short time after that, three or four days, that the Bureau of Budget acting for and on behalf of the President, issued an order shutting off all purchases of sites and construction of buildings except where certain proposals were then outstanding and had been accepted. And we had gone ahead, we were going to take the site now in suit, but we shut off all action, and it was not until two or three months after that when the Bureau of Budget changed its mind and released Cape Girardeau that we proceeded [fol. 148] further with the site here, although we had decided on accepting it prior to that time.

Q. Now did you send out any Post Office Inspectors other than Mr. Deutsch?

A. No, sir; we didn't send Postmaster Inspectors. When the question came to the point of controversy I sent from my department the superintendent of my divisional quarters, the highest man I had, Mr. Joseph B. Beterly; and Mr. Reynolds sent his fiscal manager Mr. E. R. Witman. They came out here. And we also had an architect. I am not sure who the architect was because we sent architects on two different occasions. In the early proceedings we sent an architect by the name of Tucker, and later in the proceeding after this controversy arose we sent another architect, but I do not recall his name.

Q. You sent two different architects out here to examine the site and report to you?

A. We did.

Q. Now were the reports of these architects considered by your committee? A. They were.

Q. Were the reports made by Mr. Beterly and Mr. Witman considered by your committee? A. They were.

Q. Was the petition that was submitted to you opposing this site considered by your committee? A. It was.

[fol. 149] Q. Did Judge Kelso here appear before your committee? A. He did.

Q. And were his statements and objections to this site considered by your committee? A. They were.

Q. Now was the rather voluminous report made by Mr. Deutsch, the post office inspector, in which he listed some twenty odd sites, was that considered by your committee?

A. It was considered very much in detail.

Q. Now I will ask you, Mr. Meyer, if you took into consideration all of the information that was furnished to you and that you could obtain relative to the selection of this site?

Mr. Kelso: To which we object to any such conclusion of the witness in this case.

The Court: Were you asking in respect to what he did or the committee?

Mr. Cooper: He was part of the Committee, Your Honor.

The Court: If you are asking for what the committee did, I will sustain the objection. If you are asking him what he did, I will overrule it.

Mr. Cooper: I will first ask it about the Committee, Your Honor, and let you sustain the objection, and save an exception. And then I will confine it to what he did and save the record on it.

A. For my part, I went over the reports at the time and [fol. 150] discussed them with not only my superintendent of quarters and his assistant, but also with some of the representatives of the Federal Works Agency, that is of the Public Building Administration. I was trying to get, so far as I was concerned, all of the possible information that I could get in order that I might make an intelligent decision when it was made.

Q. Now are you acquainted with Postmaster-General Frank Walker? A. I am.

Q. Are you acquainted with his signature?

A. I am.

Q. I now hand you this selection of the site here in which there appears to be some initial below his name there, which is in question.

A. That is his signature. The initials below I believe are F.H.E. This is a route matter that goes through the office of the clerk of the Post Office Department, and before the Postmaster-General attaches his signature he desires the initials of those presenting the matter to him, and that is the initial of the clerk Frank H. Ellis. That is his signature.

The Court: You are referring to Government's Exhibit 4?

A. Government's Exhibit 4; yes, sir.

Mr. Cooper: You may ask him.

Cross-Examination.

By Mr. Kelso:

Q. General, when did you take office as Fourth Post-[fol. 151] master-General? A. June 15, 1940.

Q. Where had you resided prior to your residence in Washington? A. Indianapolis, Indiana.

Q. What was your business prior to entering the Post Office Department? A. I was a lawyer.

Q. What experience had you with reference to post office sites before becoming Assistant Postmaster-General?

A. I had none with respect to post office sites except perhaps an interest I had one time in clearing up a title.

Q. But you had no experience with the machinery of making investigations in the selection of sites?

A. That is correct.

Q. Now after you became the Fourth Assistant Post-master-General, they clamped down immediately on the appropriations for sites?

A. Not immediately, not until November 23, 1940.

Q. Now what sites did you participate in the selection of for post offices, prior to the Cape Girardeau?

Mr. Cooper: Object to that. It is wholly immaterial what sites he selected. They are not in issue here, Your Honor.

The Court: Overruled.

Mr. Cooper: Exception.

[fol. 152] A. I can't tell you the number; there were quite a few. One was at Athens, Georgia; two or three were in Pennsylvania. One was a substation in New York.

Q. At Athens, Georgia, did you send a site investigator to investigate sites over there, and recommendations?

A. Oh, yes, sir.

Q. Do you know whether you followed the recommendations of your site investigator in that case?

Mr. Bianton: We want to object to going into these details about these other sites. There might have been a thousand different reasons why in one case he would follow the recommendation of an agent and not in another case.

The Court: Overruled.

A. I couldn't tell you about any particular site unless I got the file; but it all depended on the situation that came before us. Sometimes we follow the recommendation and sometimes we do not. They are not recommendations really; they are merely advisory reports.

Q. Then do you now state that your committee has no rule, guide or regulation of any kind with respect to the making of investigation and the action thereon?

A. No, sir; I state that our committee uses its best judgment. That is its principal rule.

Q. Upon what kind of regulations or instructions do you act when you send out a site investigator?

[fol. 153] A. We request that that investigator make a complete investigation of all the facts and conditions surrounding the particular location in the particular city in which the post office is desired, and anything that might be pertinent in connection with the operation of a post office there.

Q. Now the Government's only site investigator in this case was Post Office Inspector L. J. Deutsch?

A. That is not correct. Mr. Beterly came out to go over this matter, Mr. Witman came out, and two architects came out to go over it.

Q. Did Mr. Beterly make any written recommendations with respect to the advantages of any site and the disadvantages of any site, that was made a record in your office?

A. I don't think so; I think he made it orally.

Q. Did Mr. Witman make any recommendations with respect to the advantages or disadvantages of any site?

A. He didn't to me. I presume he did to Mr. Reynolds.

Q. But there was nothing before your committee showing that he made any report?

A. Oh, yes, sir, orally reported to us.

Q. But there is no record of any?

A. I don't know of any written record.

Q. Now Mr. Tucker was an architect or associate architect in the Department of the Public Works Administration? A. Public Buildings Administration.

[fol. 154] Q. Public Buildings Administration. And when he came to Cape Girardeau, did he have any instructions?

A. I presume he had. He works under the Public Buildings Administration, and they always give instructions to their representatives when they send them out.

Q. Did you know that Mr. Tucker stated to a group of people in the Chamber of Commerce room, who were meeting to hear him discuss the matter, that the people of Cape Girardeau could take either the post office site at the court house or nothing?

A. I recall no such report as that made by him.

Q. Do you recall whether he made any drawings or project map of any kind of the post office park?

A. I do not recall that.

Q. I mean the Court House site.

A. I think we had some of those before us; had some sketches.

Q. But there was no project made? A. No, sir.

Q. Now then, do you recall that Mr. Tucker carried out a truth when he stated that the Public Library Building would not in any way be interfered with by the acquisition of any portion of the property for a site for the court house?

A. I know nothing about any statements by Mr. Tucker.

Q. Did he show you any map that would show how he proposed to enter the ground?

[fol. 155] A. Whatever Mr. Tucker had was put in the file of this particular case and was brought to our meetings. Mr. Tucker didn't personally appear there.

Q. Well, did you state that it was your understanding that Mr. Tucker had a right and the power and authority to investigate sites at Cape Girardeau and to make his recommendations as to the different sites?

A. No, sir; he was gathering information which we hoped to use in reaching a conclusion.

Q. Well, did that apply to all the sites or to just the one that you did finally select?

A. It applied to all of the sites.

Q. Mr. Tucker then, according to your understanding, was directed to investigate all the sites?

A. No, sir; he was to gather information that would enable us to make a choice between those to which we had boiled it down. That was the real purpose of his visit, as I recall.

Q. Well now, you said there was another architect, Mr. Hart?

A. I don't recall the name of the other architect. There was another architect that came out later on.

Q. You referred to an occasion when you say that I was present at a meeting of the committee?

A. That is right.

Q. Did we discuss the necessity of obtaining the opinion [fol. 156] of the title before proceeding with this matter?

A. I think we did. I think you did, rather.

Q. Do you recall that you stated then that no such opinion had been obtained?

A. Opinion as to what?

Q. As to the title to the property now sought to be condemned.

A. I do not recall that.

Q. Do you recall that you discussed at length and said that the City Attorney of the City of Cape Girardeau was the only one that had said up to that time that the City had a legal right to convey the property in question?

A. I recall no such conversation as that. I recall this: That he adverted to the visit of the City Attorney Mr. Oliver and the visit of the other lawyer. I believe his name has been given me as Mr. Frank Lowry. At that time some decisions were presented to us, which were later read; at least I did. And you and I discussed those. We differed as to our conclusions, if you recall.

Mr. Kelso: No, I only recall that the statement was made that you had to refresh your memory, that the title to the property would have to be investigated by the Department of Justice.

A. That was your assertion.

Q. And you didn't get any opinion from the Depart-
[fol. 157] ment of Justice on that?

A. I didn't get any opinion; no, sir.

Q. Your committee did not?

A. No, sir; not that I know of.

The Court: Did you reach your conclusion on the theory the City would convey title to this land?

A. Yes, sir; I read the cases that had been presented, and I was of the opinion that the opposing view was not correct. I had practiced law for thirty years myself and thought that might mean a little something.

The Court: Proceed.

By Mr. Kelso:

Q. You never filed any opinion as to the title with your committee?

A. No, sir; there was no reason to.

Q. Well, Mr. Witman isn't a lawyer, is he?

A. I don't know about that. He knows a good deal about real estate titles, if he isn't.

Mr. Cooper: We think that is taking up time, Your Honor. These people are not the people to determine titles; that is a question for the Attorney-General after the site has been selected.

The Court: Overruled.

Q. Do you recall that Mr. Tucker had any report with respect to any property in sites offered at Cape Girardeau in any form other than his report on the court house park site?

A. I couldn't tell you that. I do not recall the details of
[fol. 158] his report. I just know in a general way that he came out to get information, which we considered along with all other available information in reaching a decision.

Q. Well, do you recall whether the other architect that you sent out was instructed to make or in fact did make

any [investitation] of any site other than the Court House Park?

A. The other architect would report back to the Public Buildings Administration. And as I told you before, I would only get that as it appeared in the files at our meetings.

Q. So you have no knowledge now?

A. I have no recollection of his report. I just know we sent him out here.

Q. And you have no recollection of the reason for sending him?

A. Yes, sir; of course, I have.

Q. All right, what was it?

A. To enable us to reach a conclusion to get what available facts we found necessary to reach a conclusion. There was a question arose as to putting up a building here that would be in conformity with the general character of all surroundings of Cape Girardeau. It was our view that we would try to do something that would not only be a thing that the Government could take pride in, but that it would be something that the City of Cape Girardeau could take pride in; that we would put up a building that would house our judiciary in a decent way and [fol. 159] generally in conformity with the entire beauty of the place because as we understood—I had not seen the place then—the site was located on a bluff, it was at an advantageous place, it was a thing of beauty, and we wanted to make something that both of us could be proud of.

Q. Well, did you talk with anyone about the site outside of citizens of Cape Girardeau?

A. Those who went out in our behalf, I talked to them. Mr. Beterly and Mr. Witman appeared at our meetings.

Q. What is Mr. Beterly's occupation?

A. He is Superintendent of the Division of Quarters in the Bureau of the Fourth Assistant Postmaster-General.

Q. And he attended the meetings of the Committee in your absence as your representative?

A. No, sir; he attended the meetings of the Committee in my presence. He accompanied me.

Q. Did he ever attend any meetings in your absence?

A. Yes; I think he did.

Q. Did you give him any instructions to investigate any sites in Cape Girardeau?

A. I did.

Q. Other than this court house?

A. I did.

Q. What sites did he report on?

A. He reported on all five of the sites that appeared in [fol. 159a] the record. I can't describe in detail what they were, but those five sites that appeared in the record, he looked into; and particularly the present site and the site now in suit.

Q. He made no written report to either you or the Committee?

A. No, sir; he made no written report.

Q. Is there a record kept, as you indicated here, of your proceedings?

A. Oh, yes, sir.

Q. Is there a record kept of the findings that the Committee makes with respect to any matter?

A. Yes, sir; there is.

Q. Now then, would your committee recommend a site that was endorsed by outside parties, for any reason of influence on anybody?

A. No; we make it on our own responsibility.

Q. Did anybody outside talk to you about it? To use the language of Mr. Witman, did any of the Gentlemen on the Hill talk to you about it? A. No, sir.

Q. Were they interested in the selection of this site?

A. They were not interested in the selection of the site. The only interest that was shown on the Hill, if you refer to Congressmen—

The Court: What hill are you talking about?

[fol. 160] Mr. Kelso: In the hearings down there they refer to the "Gentlemen on the Hill" as Senators and Congressmen.

A. One Congressman talked to me, not with respect to any site. He said the only thing he was interested in was getting an allotment of money set aside for the building of a Custom House and Post Office at Cape Girardeau, Missouri.

Q. Was there any other gentleman on the Hill that made any recommendation?

A. I think not. That was the extent of his recommendation. He said he didn't care where it went; we were to use our own judgment.

Q. Now then, to be specific—

The Court: We will take a recess, Mr. Bailiff, until 1:30.

Pursuant to adjournment, the hearing was resumed at 1:30 P. M., April 18, 1944, as follows:

The Court: Proceed, Judge Kelso.

By Mr. Kelso:

Q. Just before the adjournment at the noon recess I asked the question as to whether any Senator was interested in the selection of the site.

A. Not of any particular site. They were interested, both Senators were interested in getting the property reinstated by the Bureau of the Budget so that a post office might be built here, but nothing was said about the site that I recall.

Q. The only information that you had was the information contained in the reports made by Mr. Deutsch and Mr. Tucker and the other architect, and Mr. Beterly and Mr. Witman?

[fol. 161] A. It was whatever information was in the file. If there was any more information in the file, we considered it.

Q. At this time you have no recollection of anything other than the information you have given?

A. I don't recall anything further.

Q. Is it the practice of the members of the committee, or of the Postmaster-General or the Administrator of the Public Works Agency to visit with persons about the selection, singly and outside of the hearings of the Committee?

A. I can't answer that because I don't know what the practice of the Postmaster-General or the Administrator of the Federal Works Agency is.

Q. The Postmaster-General is the man who you say signed the request for the institution of this suit? Is that right?

A. I don't think I ever said anything like that.

Q. You were shown an exhibit and identified his signature?

A. Yes, sir; that is correct.

Q. Now do you recall what that signature was signed on or to? A. No; I do not.

Mr. Kelso: Do you have the exhibit, Mr. Cooper?

Mr. Blanton: Which exhibit do you want?

Mr. Kelso: The one he identified the signature of General Walker.

Mr. Blanton: That is Exhibit No. 4.

Mr. Cooper: That is the joint selection of the site.

[fol. 162] By Mr. Kelso:

Q. I show you Exhibit 4 of Plaintiff.

A. This is the selection signed by the Postmaster-General and Federal Works Administrator.

Q. Have you ever seen that before, the original of that paper? A. I think I have.

Q. Did you [prepared] that?

A. No, I didn't.

Q. Did your committee prepare it?

A. It was prepared at the direction of the committee.

Q. Do you know who prepared it?

A. No, I do not.

Q. When you say "at the direction of the Committee," do you refer to your so-called joint committee?

A. That is right, Mr. Reynolds and myself.

Q. Now, do you recall now when the suit was instituted to condemn this particular property?

A. No, I do not.

Q. Well, do you know that this case was passed upon by the Circuit Court of Appeals?

A. I do.

Q. Is it true that this request that has been identified as Exhibit 4 by you was signed after the case had been filed, prosecuted to the Court of Appeals and reversed and remanded?

A. This is not a request, it is the selection of a site. It bears the date of June 10, 1943.

[fol. 163] Q. Then the site was not selected by General Walker as Postmaster-General and General Fleming as

Administrator of the Public Works Agency until 1943, in June?

A. This particular thing was not executed until June 10, 1943, but the site had been selected by virtue of the authority vested in me as Fourth Assistant Postmaster-General to represent the Postmaster-General, and kindred authority vested by Congress and the President in the Commissioner of Public Buildings as representing the Federal Works Administrator.

The Court: The question was, "had the Postmaster-General selected this site." Can you answer that?

A. Yes, sir; he selected it through my action.

The Court: That was not the question. He asked if the Postmaster-General had selected this site.

A. Well, that is the execution of his formal action.

The Court: Can you answer the question directly?

A. Yes, sir; my answer is Yes.

By Mr. Kelso:

Q. Now was there any information assembled with respect to the selection of a site for the post office at Cape Girardeau after the suit had been reversed by the Circuit Court of Appeals in this proceeding?

A. Not that I know of.

Mr. Cooper: I would suggest, Your Honor, that he fix the date of the reversal. I suggest he state in his question the date as the date of the reversal.

[fol. 164] The Court: What is the date?

Mr. Cooper: I don't know. I presume he does.

Mr. Kelso: April, 1943, Mr. Hall says; April 26, 1943.

A. Not that I know of, except the execution of this formal instrument.

Q. Who was Attorney-General prior to General Walker? I mean Postmaster-General?

A. James A. Farley.

Q. When did General Walker become Postmaster-General?

A. Sometime in October, 1941. 1940 I should say.

Q. And your files, to your knowledge, have no papers of any kind showing any action taken by Postmaster-General Walker in his capacity as Postmaster-General, prior to the signing of this paper on June 10, 1943?

A. I think that is correct.

Q. And that is also true of General Fleming?

A. I don't know, but I assume so.

Q. Do you know whether there was an information furnished to the Postmaster-General or the Administrator of Public Works Agency, in the form of a plat showing the property sought to be condemned in this proceeding, before the architect H. A. Tucker visited Cape Girardeau?

A. I don't know.

Q. Do you know whether the original plan for the condemnation of a part of the Park and court house contemplated the condemnation of the site of the Public Library Building?

[fol. 165] A. My recollection is that it didn't contemplate the condemnation of the Public Library site.

Q. At the time that Mr. Tucker, the architect, visited Cape Girardeau for the purpose of making plans on this site for the development of ideas on the court house property as the site for the new Post Office Building, did you know that the site did not include the acquisition of the site of the present Library Building.

A. I don't recall that.

Q. Do you know when your committee first decided to condemn the site of the present Public Library Building?

A. At the time that we accepted the proposal.

Q. It was understood then by you that it was contemplated at that time to remove the Public Library Building and to acquire the site upon which it was located as part of the site of this project?

A. No, sir; it was our purpose to condemn whatever was described in the proposal and for which we made exceptions. If that included the Library site, then of course we proposed to condemn it, too. If it didn't, we didn't.

Q. Have you any independent knowledge now, when you say it did not at one time, or did at a later time, have you any independent knowledge as to when you determined to acquire the site of the Public Library Building?

A. My recollection is not clear on that point.

[fol. 166] Q. Who prepared the form of the proposal signed by the City?

A. Here? Signed here?

Q. Yes, sir.

A. It came from the Public Buildings Administration.

Q. The City then merely signed the proposal addressed to your Administrative Public Works Agency, which had been prepared by the Department or your Committee in Washington?

A. In accordance with its rules and regulations, yes, sir.

Q. Do you remember Mr. Roome?

A. I remember the name; that is all. He was a part of the Public Works Administration.

Q. Do you know whether he was ever at any time authorized by your Committee to appear in Cape Girardeau for the purpose of investigating the sites and the merits of the sites offered? A. He was.

Q. Did he prepare this proposal?

A. I don't know.

Q. When Mr. Roome, then, if he made any negotiations, did he enter into any negotiations with anybody, which was with the authority and under the instructions from your committee, as far as you know?

A. He had no authority to negotiate with anybody except for the purpose of soliciting proposals and making investigations with respect to the various proposals that might have been presented, if any were.

[fol. 167] Q. Do you know whether Mr. Roome made any investigation of any sites offered, while in Cape Girardeau? A. I don't know.

Q. Did Mr. Roome make any report to you of any investigation of any sites while he was in Cape Girardeau?

A. Not to me.

Q. Well, did he make any report to your committee?

A. He made a report to the Public Buildings Administration. He was their employee.

Q. Now Mr. Roome, you say he represented the Public Administration?

A. No, sir; he was employed by the Public Buildings Administration.

Q. Public Buildings Administration?

The Court: Is that the same as the Federal Work's Agency?

A. No, sir; the Federal Works Agency is very much broader in its scope. The Public Buildings Administration bear the same relation to the Federal Works Agency that the Bureau of the Fourth Assistant Postmaster-General does to the Post Office Department. The Bureau of the First Assistant has eight divisions that it handles, and the Public Buildings Administration handles the question of public buildings and affairs and things associated with it. It was a part of the Federal Works Agency, which includes roads and a number of other things.

Q. Mr. Roome was no part of the force of employees of [fol. 168] your Committee?

A. Yes, he was to this extent, that in his capacity as an employee of the Public Buildings Administration, whatever he reported back to his chief came before us eventually in the file for consideration.

Q. Who was his chief?

A. W. E. Reynolds, Commissioner of Public Buildings.

Q. Then Mr. Reynolds in his capacity as a member of that committee, acted as Chairman of that committee, did he not?

A. There is not any Chairman; there are only two members, and we act together.

Q. How many people assemble there to consider a matter? A. Usually five, and some times six.

Q. When five or six members of that group assemble, is there anyone that acts as Chairman or presiding officer of that group?

A. Not necessarily. It is an informal meeting where we all sit around the table and start the discussion of the matter in hand.

Q. How long has Mr. Reynolds been acting in the capacity that he is now acting?

A. Oh, for a number of years. I do not know exactly how many. He was there long before I came into the Government, I know.

Q. Mr. Reynolds is what is known in the language of the department there as a man who is a career man in [fol. 169] this world? A. I don't think so.

Q. How long has he been at it?

A. He has been at it some, I assume 8 or 9 years. He used to work for a large construction company.

Q. But he has been working at this job. How is he selected? A. That I don't kno .

Q. Do you know whom he represents?

A. Yes; he represents the Federal Works Administrator.

Q. But how he is selected, you do not know?

A. No, sir; I don't know that. I presume he is appointed by the Federal Works Administrator. There is a provision in the President's executive order for the appointment of a Commissioner of Public Buildings, and it would be in the manner provided by law.

Q. Do you have anyone whose duty it is to act as custodian of your records and files?

A. Yes, sir; Mr. Doyle makes records and takes care of them.

Q. Then Mr. Witman is not in charge of any of the records and files of your department?

A. Yes, sir, he is; he is the fiscal manager of the Public Buildings Administration. He handles what comes within his jurisdiction. But when you speak of the records of the Committee, Mr. Doyle takes notes of the minutes and [fol. 170] keeps those records, if that is what you mean.

Q. I mean that when a report is filed or made, written or oral, and goes into a file, who keeps that file?

A. That I don't know. I would assume that it would belong in the files of Mr. Witman.

Q. Then if any reports were made by any site investigator or any architect in any form, Mr. Witman then would be the custodian of that report?

A. I say I assume so. I don't know, I am not familiar with the manner in which they handle the records in the Public Buildings Administration.

Q. You have no record in your office of the proceedings of that committee, that is used as the public records?

A. We have insofar as we participate.

Q. Will you tell me what the record is that you have?

A. It is a record of all the correspondence and all reports of inspectors that come in. Those are kept in our files.

Q. Now is there anything in your file that would not appear in the file that is kept by Mr. Witman?

A. I can't tell you that as a matter of certainty because I do not know what his files are. We might have some things that he doesn't have.

Q. Would you have in your file any record with respect to the matter of selecting a site that you didn't report to your committee? A. No.

[fol. 171] Q. Well then, can you say whether you did report to the committee matters that were brought to your attention and in your file? A. Most certainly.

Q. Then if you did that then it would be the duty of Mr. Witman as custodian to know that fact, would it not?

A. I assume so. As I told you before, I am not familiar with his records.

Q. Do you know Mr. Tucker personally?

A. No, I do not.

Q. And you have not up to this time ever seen any report made by him? A. I have not.

Q. Have you ever contacted Mr. Roome? A. No, sir.

Q. And up to this time you have never seen any report made by him with respect to this site?

A. I have heard about his reports. I have never examined them personally. We have discussed them at the meetings of the committee.

Q. To answer the question, you have never seen one of the reports or any report made by him?

A. I might have seen them when they were brought before the committee; but there are thousands of those reports, I could not identify any particular one from memory now.

[fol. 172] Q. And you have no knowledge of having seen any such report?

A. Just as I have explained to you, if it came before the committee, then I discussed it and might have had the facts presented to me. I can't tell you the details.

Q. Can you say whether the question of the instructions given to Mr. Roome were discussed by your committee.

A. I think that took place before I got on the committee. I am not certain about it. He went out in July I believe, and I came on in June. The matter of the project had been authorized prior to June 15, 1940.

Q. And you are not clear as to when Mr. Roome retired from the committee.

A. He never was on the committee.

Q. Well, when he retired from the duties that he was performing at the time he went out to make the investigation. A. No, sir; I couldn't tell you.

Q. And did you ever see a report made by the other engineers referred to in your testimony this morning?

A. What other engineers?

Q. You said that some architect or engineer. You said in addition to Mr. Tucker there was another.

A. Another architect I said.

Q. Well, we will be accurate about it then, did you ever see any report made by the other Mr. Architect?

A. No; I merely heard the discussion of the report.

[fol. 173] Q. Did you ever hear a verbal report made to the committee by any of these architects? A. No.

Q. And if there were any written reports or written instructions, they would be found in the custody of Mr. Witman, in your judgment?

A. I wouldn't say Mr. Witman. I would say the Public Buildings Administration.

Q. And what has he to do with the Public Buildings Administrator? A. He is fiscal manager.

Q. Are you able to undertake to say what his duties are? A. No, sir; I couldn't define his duties.

Q. Can you at this time say whether you familiarized yourself personally with the properties offered, or sites offered, when you visited Cape Girardeau?

A. Do you mean yesterday evening?

Q. Is that your first time?

A. That is my first visit to Cape Girardeau, and I saw the properties for the first time then.

Q. Then the only knowledge that you could have had of the property was from the information which had been assembled? A. That is right.

Q. And whatever action was taken was taken on the information on file?

[fol. 174] A. That is right, and what was furnished us by those who received reports.

Q. Now you said that a Mr. Himmelberger visited you or your committee in regard to this matter?

A. That is correct.

Q. Did you learn his business in Cape Girardeau?

A. Yes; I knew that.

Q. You were acquainted with him before?

A. I knew him before his visit there. I had met him before.

Q. Had you met him in Washington?

A. No.

Q. You met him in Indiana?

A. Yes, sir.

Q. Then you did know that Mr. Himmelberger was the owner of the office building in Cape Girardeau located directly diagonally across the street from the present post office site?

A. No, sir; I didn't.

Q. Did you learn it at the time he visited there?

A. No, sir; I learned it last evening.

Q. He didn't disclose to you any information as to the fact that he owned the office building there, at the time of his visit?

A. If he did I do not recall it. He might have said something about it, but it didn't make an impression on me.

Q. Did it make any impression on you that the suggestion had been made that the present building might be [fol. 175] used advantageously as an office building by the Government to take care of various agencies in this Southeastern Missouri?

A. What present building?

Q. Where you are now testifying?

A. I think there was some discussion about that. I do not recall by whom it was made.

Q. Do you recall that the owners of the office building objected to the Government going into the business of running an office building? A. I do not.

Q. You have no recollection of that?

A. I have not.

Q. And you didn't know until today that there was any competition of that kind, if there would be an office put here?

A. I knew nothing of that sort.

Q. Did you know from any paper you saw as to the character of the property selected?

A. You mean the site now in question?

Q. Yes, sir.

A. Just by the descriptions that we received.

Q. Did the description that you received disclose that there was no street on the south of that property?

A. I am not sure of my directions.

Q. That is south (indicating).

[fol. 176] A. I do not recall that.

Q. Do you know whether the report or description or plat, whatever it might have been that you had, showed that the description of the property sought to be condemned did not go any further east than the terraces?

A. I only know what was pointed out on the plat that was presented to us.

Q. Was that pointed out to you?

A. I do not recall.

Q. Did you know that the property which is described in this condemnation suit has no street or opening to the north?

A. I didn't know that.

Q. Did you know that the only entrance to this property is Lorimier Street, which runs west of the property?

A. I have seen Lorimier Street. I didn't go into the details at all. That is something with which the construction parties would be interested in, and I paid no attention to it. If it was called to my attention, I do not recall it.

Q. You didn't know until now that the property sought to be condemned has no streets or entrance of any kind on the south, none on the east, and none on the north?

Mr. Blanton: Object to that as repetition, Your Honor.

The Court: I think so.

A. I know that it was pointed out that access to the property could very easily be made. I remember that, but by what means I can't say.

[fol. 177] Q. Do you recall that Mr. — the first architect that you spoke of—Mr. Tucker, suggested an entrance in the form of a drive from Lorimier Street around the south side of the present Public Library Building to the proposed side of the new post office?

A. No, sir, I do not.

Q. Then you don't know anything about how it was proposed to enter it?

A. No, sir; I was not concerned with that because we have architects and engineers who will take care of that. We don't need to worry about a detail of that sort once we get the property. We have very competent men, and when they do things they do them right.

Q. I am not questioning the competency of the men, I am trying to get the facts.

A. I am trying to tell you the facts, too.

Mr. Kelso: The question of ability is not in issue, the question is what you know as a member of that committee about the facts relative to the site that was selected.

The Witness: What I know, it was a desirable location and that our men could make a thing of beauty and a practical utility out of it at the same time.

By Mr. Kelso:

Q. May I ask, did you know that the only entrance to that is what we call a deadend street from Themis Street? [fol. 178] A. I didn't know that, but that didn't concern me in the slightest.

Q. Did you have before you any report of any engineer or any architect that undertook to describe to you the conditions, not your conclusions as to whether it was desirable, but the conditions of the property selected?

A. We had all the information that we could gather. We went into it carefully. I don't know that we had any engineers. We had the reports that they made, whatever they were.

Q. And you have no knowledge of the reports made, nor by whom made, at this time?

A. Of course, I had at the time. I do not carry it in my head now any more than you carry a lawsuit that you tried fifty years ago.

Q. Well, I was not trying that. I don't want to make an issue of your recollection or my recollection because I am not called on yet to testify. But I would like to know whether you in your investigation considered any other site recommended in the report of your site investigator? A. We did.

Q. Will you tell us what they were?

A. We considered all of them. There were about 22 as I recall. We considered all of them. With the help of those who met we culled all the less desirable until there were five left, and from those five we eventually reduced it to two.

[fol. 179] Q. You thought five would be available, and finally two, and you selected what you thought—

A. We finally selected one of the two.

Q. I want to make this clear: Did you testify as to the terrace on this property, that you have selected, to the east?

A. Did I testify as to terrace?

Q. Yes, sir; do you know anything about that?

The Court: The Court's recollection is, he said he didn't know.

A. I don't think I know anything about that. Do you mean the side towards the river?

Q. Yes, sir.

A. No, I don't know anything about that.

By The Court:

Q. You recall this Exhibit 4, dated June 10, 1943?

A. That is correct.

Q. Was there any recommendation of the character of Exhibit 3 made before Exhibit 4 was prepared and signed?

A. I think not. I think this was the recommendation that we made here.

Q. Now Exhibit 3, as I read it, does not refer to any particular site; it simply refers to the city?

A. Refers to the City. This was a recommendation made by the Committee when Mr. Purdum sat on it, in which you notice listed several other projects. Those [fol. 180] projects would be considered from time to time at meetings, and I didn't have any part in recommending those.

Q. But Exhibit 3 refers only to the fact that they recommended the post office be built in Cape Girardeau?

A. That is right.

Q. Now Exhibit 4 is a finding of the Postmaster-General and Federal Works Administrator on a particular site?

A. Yes, sir; that is the formal procedure that follows after the committee has made the selection.

Q. What I want to know is, do you know of any character of recommendation of this site referred to in Exhibit 4?

A. Nothing but the selection that was made by us jointly. It is in the records of the Public Buildings Administration.

Q. Now was more than one site submitted to the Postmaster-General?

A. I think not.

The Court: That is all.

Redirect Examination.

By Mr. Cooper:

Q. Mr. Meyer, Mr. Kelso asked you some questions relative to Mr. Himmelberger's office building over here and referred to a matter of this building being used for office in building competition, office building competition?

The Court: I think that is a side issue in this case.

Mr. Blanton: Let's not develop that.

The Court: What the holdings of some representative men who went to Washington on various sites may have [fol. 181] been, I do not think we need go into all of those things. I do not want to limit you if you have something you feel you want to go into.

Mr. Cooper: I wanted to ask him at the time Mr. Kelso came up there, if he advised Mr. Meyer or the Committee that he owned 75 feet of property just south of this building here, that was included in one of those post office sites.

A. I do not recall that he called attention to that particularly.

Mr. Cooper: That is all on that matter.

Recross Examination.

By Mr. Kelso:

Q. As a matter of fact, you never heard and the record did not show and none of the papers indicated that at the time I appeared there that I owned any property south of this building?

A. Not that I recall.

Mr. Kelso: That is right, and I didn't.

Mr. Blanton: We ask that remark be stricken from the record.

The Court: It may be stricken. Let's put a peg on that issue, which I do not think is any issue in this case.

Mr. Kelso: I am perfectly willing for them to make the issue.

The Court: We might be here a week inquiring why people went to Washington on various post office sites.

Mr. Kelso: That is all right. I want to be clear. I propose to answer that at the proper time.

[fol. 182] Redirect Examination.

By Mr. Cooper:

Q. Now Mr. Meyer, Mr. Kelso has asked you a lot of questions relative to the joint committee working, and so on, even after he objected to my going into that matter today.

Mr. Cooper: I think, Your Honor, he has laid down the bars.

Q. Now I would like for you to tell the Court how this joint committee is composed, whom it is composed of, and the workings of that joint committee, if you will?

Mr. Kelso: To which I object because it is certainly repetition of the testimony.

The Court: I thought you went into that. If there is some part of it you did not, you may do so.

A. The Committee consists of two persons, the Commissioner of Public Buildings, acting as the representative of the Federal Works Administration pursuant to a statute and an Executive order. I believe it is Executive Order 6166. The Fourth Postmaster-General is designated as the representative of the Postmaster-General and the Post Office Department pursuant to a regulation, Section 13 of the Postal Laws and Regulations, and that clearly defines his duties in broad general terms. These two members constitute the committee, and wherever the postal service is involved the two determine the location of the site.

Q. (Mr. Cooper) And make the recommendations, do they, to the Postmaster-General and the Public Works Control?

Mr. Kelso: That is the matter that I objected to this [fol. 183] morning. That is conclusion. That is all gone over and I object to it.

The Court: Overruled.

A. In many cases, of course, recommendations are made in the names of the Postmaster-General and Federal Works Administrator. There have been a number of occasions when they have not been signed by either one, the matter has gone through and goes to a conclusion and the title acquired. If there is at any time any doubt, then they proceed by way of condemnation. There are some parties who desire to be meticulous and they ask for signatures of the Postmaster-General himself and the Federal Works Administrator himself, and in such cases it is always provided if it is asked for; but in most cases it is assumed that the Joint Committee represents both of those persons and acts fully in their behalf as their representatives. Now the Public Building Administration—

The Court: I do not believe you are answering the question. I think you have answered it.

Mr. Cooper: The question was whether or not they made their recommendations to the Postmaster-General and the Public Works Administrator.

The Witness: Then I expect I have gone over that.

Mr. Kelso: I want to here move that the answer of the witness to that question be stricken out because the Statute [fol. 184] defines the duties of the Attorney-General—Postmaster-General and Administrator of the Public Works Agency, and it is wholly incompetent for this witness to assume what the regulation is or to assume what is the law.

The Court: Sustained.

Q. (Mr. Cooper) Now in the construction of all Federal Buildings where there will be quarters for a post office, does your Joint Committee consist of you, representing the Postmaster-General and Mr. Reynolds, representing the Public Works Administration? Do you cooperate?

A. We do.

Mr. Kelso: That asks for a conclusion, and I ask it be stricken.

The Court: Overruled.

Mr. Kelso: It is a question of conclusion telling what they do.

Q. Now just tell the Court, if you will Mr. Reynolds, to what extent and how far you cooperate relative to the selection of a site, the building, and so forth. I mean Mr. Meyer?

A. There being two members of the Committee, we must both come to the same point of view, where there is no site selected and no plans approved.

Q. Now do you select the site? Does the Committee select the site? A. It does.

[fol. 185] Q. Subject to the approval of the Postmaster-General and Public Works Administrator?

A. That is right.

Q. Then do you select the type of building [that] shall be [build] there? A. We do.

Q. Now then, who has the construction of that building, after the site has been selected and the type of building has been decided upon? A. The Federal Works Agency.

Q. Federal Works Agency? A. Yes, sir.

Mr. Cooper: That is all, Mr. Meyer.

Mr. Kelso: That is all; thank you.

Mr. Cooper: Now, Your Honor, we desire to offer in evidence a portion of Section 13 of the Postal Laws and Regulations, reading as follows:

Mr. Kelso: To that offering we adopt the same objections that were made to the other exhibits; and for the further reason that it is no proof.

The Court: The same ruling.

Mr. Cooper: '13. To the [Fourt] Postmaster-General are assigned the duty of representing the Postmaster-General on the joint Departmental Committee, administer-[fol. 186] ing the details of public building programs authorized by Congress outside of the District of Colum-

bia; the authorization of allowance for rent, light and fuel and the consideration of the general engineering programs affecting the activities of the postal service; the exchange and distribution of equipment and supplies for the postal service; the administration and operation of Government-owned post office buildings, appointment and discipline of personnel engaged in the operation and maintenance; requisition and distribution of cleaning and operating supplies and equipment; the authorization of allowances for hire of vehicles used in the delivery and collection service, and the conduct of the screen wagon, pneumatic tube and Government-owned motor-vehicle service in cities; the production and distribuiton of post-route and parcel-post zone keys; the general supervision of the mail equipment shops, and the manufacture and repair of mail boxes, locks, keys and key chains."

The Court: What statute do you claim authorizes that?

Mr. Cooper: That is Section 13 of the Postal Laws and Regulations.

Mr. Blanton: We will supply Your Honor with the citation on that.

The Court: I would like to know the citation of the Statute.

Mr. Kelso: We would like to have that, too, Your Honor.

The Court: Very well. Proceed.

[fol. 187] Mr. Cooper: We rest, Your Honor.

The Court: Take a recess for ten minutes.

Thereupon, a 10-minute recess was taken at 2:23 P. M., April 18, 1944, following which the proceedings were resumed as follows:

Mr. Blanton: I can supply this section. This is Section 13 of the Postal Laws and Regulations. Title 5 of the United States Code, Section 22, Sections 363 and 369, and particularly subparagraph No. 2 of Title 5. Of course, there are many citations in the code, some dealing with regulations of the Postmaster-General.

Mr. Kelso: Your Honor, we want to file a demurrer to the evidence at this time, and we would like for the record to show that we have permission to file it.

The Court: Let the record show it is filed and overruled.

[fol. 188] (Demurrer of Defendant Iska W. Carmack to Evidence Introduced by Plaintiff and for Judgment in her favor.)

Now at the close of the case comes the defendant, Iska W. Carmack, with leave of court, and demurs to the evidence introduced during the trial of the case, and asks for judgment in favor of defendant, Iska W. Carmack, and against the plaintiff, United States of America, for the following reasons:

First: That said evidence contains no proof of any necessity to acquire the site now used by the Cape Girardeau Court of Common Pleas, city offices, public library building, and public library, sought to be condemned in this proceeding, as a site for the Post Office and Custom House at Cape Girardeau, Missouri.

Second: That said evidence contains no proof that the failure of the plaintiff, United States of America, to secure the property sought to be condemned, would result in the failure or destruction of a public project, namely, the construction and erection of a United States Post Office and Custom House building in the City of Cape Girardeau, Missouri.

Third: That said evidence contains no proof that the plaintiff, United States of America, could not acquire by purchase, condemnation, or otherwise, property suitable and fitted as a site for the Post Office and Custom House Building, other than the property already devoted to public use sought to be condemned in this proceeding.

[fol. 189] Fourth: That said evidence offered on the trial of this case shows that the alleged selection of the property sought to be condemned was not necessary, and is contrary to the opinion and mandate of the Circuit Court of Appeals in this proceeding and now on file with this Court as a part of the record in this case.

Fifth: That said evidence shows that the property sought to be condemned in plaintiff's (Second) Amended Petition in Condemnation filed in this proceeding, is now and has been for many years devoted to public purposes (the Common Pleas Court House, City Offices, Public Library Building, Public Library, Public Monuments, Bandstand, and Public Park).

Sixth: That said evidence shows that pursuant to official instructions, Post Office Inspector, M. J. Deutsch, the Government's only Site Agent in this proceeding, visited said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri, for the purpose of investigating and recommending to the Administrator of the Federal Works Agency, an available, suitable, and fitted site for the construction and maintenance of a Post Office and Custom House at Cape Girardeau, Missouri.

Seventh: That said evidence shows that pursuant to official instructions, the said Post Office Inspector, M. J. Deutsch, did, after investigating all the sites offered in pursuance of notice to submit offers of sites for the construction and maintenance of a Post Office and Custom House at Cape Girardeau, Missouri, make a report to said Administrator of the Federal Works Agency recommending as the first choice of a site, property other than the public property already devoted to public use described in plaintiff's (Second) Amended Petition in Condemnation filed in the above entitled cause.

Eighth: That said evidence shows that the property sought to be condemned by plaintiff, the United States of America, in this proceeding, is in the nature of a public [fol. 190] park upon which is located a Court House used by the Common Pleas Court of Cape Girardeau County, a court of record; a Public Library building used for a public library; a bandstand used as a bandstand and also as a place of public meetings; a memorial monument surrounded by a fountain, and a memorial [minument] to W. F. D. Bajer, the latter being in front of the library building.

Ninth: That said evidence shows that the park upon which these structures are located is used for gatherings of the Boy Scouts, and gatherings of various other groups.

It is also used as a place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but is used for public speakings. That the second story of the Court House is occupied by the Common Pleas [Couty,] a Judge's Chambers, and a law library for the Court, the entire second floor being appropriated to the Common Pleas Court Service. That the first floor is occupied by the various city officials, including the city clerk, the city engineer, the mayor, the city council, the city attorney, and also the clerk of the Court of Common Pleas. There is a basement in this building used largely for a storage place, in which to keep files and records of the Court of Common Pleas. That the Government seeks to condemn all the property and the improvements thereon except the library building.

Tenth: That said evidence shows that the City of Cape Girardeau will be required to vacate said public library building situated on the said real estate sought to be condemned in this proceeding, upon thirty days' notice by the Government.

Eleventh: That the evidence in this proceeding shows that the Petition in Condemnation in this proceeding was filed in this Court by the plaintiff on the 22nd day of November, 1941; that the alleged request made by the Postmaster General and the Administrator of the Federal Works Agency, acting jointly, was made on the .... day of June, 1943; that the said alleged request of the said Postmaster General and the said Administrator of the [fol. 191] Federal Works Agency, acting jointly, was not made in this proceeding until after the Circuit Court of Appeals had entered up a judgment reversing and remanding this cause for further proceedings in this Court in conformity with the opinion and mandate of the said United States Circuit Court of Appeals now on file in this Court as a part of the record in this proceeding.

Twelfth: That said evidence shows that the Administrator of the Federal Works Agency and the Postmaster General ignored and wholly disregarded the opinion of the Supreme Court of the State of Missouri construing the deed from Lorimier heirs of September 11, 1820, relied

upon by the plaintiff, United States of America, in this proceeding.

Thirteenth: That said evidence shows that the Administrator of the Federal Works Agency and the Postmaster General did, in making the alleged request of the .... day of June, 1943, ignore and wholly disregard the fact that under the [tersmf] of the deed from the Lorimier heirs of September 11, 1820, to the inhabitants of the town of Cape Girardeau, as construed by the Supreme Court of the State of Missouri, the present City of Cape Girardeau, Missouri, has no power to convey the premises to the plaintiff; and has no power to agree to exchange the property sought to be condemned in this proceeding, for other property.

Fourteenth: That said evidence shows that plaintiff's (Second) Amended Petition fails to allege that failure of the plaintiff, United States of America, to acquire property already devoted to another public use as the site of a Post Office and Custom House at Cape Girardeau, Missouri, would result in the failure of a public project, namely, the failure to construct a Post Office and Custom House at Cape Girardeau, Missouri.

[fol. 192] Fifteenth: That said evidence shows that the plaintiff, United States of America, has no right, under its said (Second) Amended Petition, to any order or orders or judgments, preliminary or otherwise, in this proceeding.

Sixteenth: That the evidence in this case shows that the property sought to be condemned, is not the only available property reasonably fitted as a site for the Post Office and Custom House in Cape Girardeau, Missouri, and that a failure to secure that site would not result in the failure or destruction of a public project, namely, the construction of a Post Office and Custom House at Cape Girardeau, Missouri.

Seventeenth: That said evidence shows that there was at the time of the alleged selection of the property sought to be condemned, other available property reasonably fitted as a site for the Post Office and Custom House at Cape Girardeau, Missouri.

Eighteenth: That the evidence shows that John N. Edy, the person who signed the alleged request to institute the proceedings in this case, just happened to be the Acting Administrator the day that said alleged request was signed, and that, acting in that capacity, the said John N. Edy signed whatever papers were put on his desk for signature; that the said John N. Edy, in addition to his other duties, acted as Administrator in the absence of the Administrator at that time.

Nineteenth: That the said evidence shows that said John N. Edy had nothing to do with the transactions involved in this proceeding, the exception would be that he was the Acting Administrator the day that the papers were executed and he would have known nothing about it, and the signing of it would have been the only connection that he would have had with it, because in the normal conduct of his duties he would not have acted on the matter. He signed the original, that would be the only exception.

Filed 4/19/44. Jas. J. O'Connor, Clerk.

[fol. 193] Thereupon, the defendants to sustain the issues in their behalf, offered and presented the following evidence:

Mr. Kelso: Shall I proceed, Your Honor?

The Court: Proceed.

Mr. Kelso: The defendant Iska W. Carmack desires to offer in evidence a stipulation between the plaintiff United States of America and the defendant Iska W. Carmack regarding an agreed statement of facts to be read in evidence on the part of the defendant Iska W. Carmack in the above entitled cause. Now that is marked in the record from Washington as "Defendant's Exhibit E, 2/28/44," by the stenographer taking the deposition. I will let the reporter mark it here as "Defendant's Exhibit A."

Let the minutes show that this was marked as "Defendant's Exhibit B" on 2/8/44, by A. O. P.

[fol. 194] (Defendant's Exhibit A — 4/18/44 AP.)

In The United States District Court
Eastern District Of Missouri
Southeastern Division

United States of America, Plaintiff,
File No. 482 versus Civil Action
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al.
Defendants,

File No. 482 Condemnation Suit

October Term, 1943.

Stipulation Between The Plaintiff, United States of America, And Defendant, Iska W. Carmack, Regarding An Agreed Statement Of Facts To Be Read In Evidence On The Part Of The Defendant, Iska W. Carmack, In The Above Entitled Cause.

Initialed by Howard B. Smith, Shorthand Reporter.

HBS

Subscribed and sworn to before me on Nov. 22, 1943

MARGARET C. SCOFIELD
Notary Public

[fol. 195]

Washington, D. C.,
Tuesday, November 9, 1943.

Without limiting either the right of the defendant, Iska W. Carmack, to take depositions in the above entitled cause, or the scope of the inquiry in the above entitled cause, it is agreed between the plaintiff, United States of [fol. 196] America, and Iska W. Carmack, one of the defendants in the above entitled cause, as follows:

Item I. Agreed Statements of Facts.

That the United States of America, plaintiff, and Iska W. Carmack, one of the defendants in the above-entitled case, admit the statements of facts hereinafter set out, and agree that said statements of facts shall be read in evidence on behalf of the said defendant, Iska W. Carmack, on the trial of a certain cause now pending in the United

States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482 (Condemnation Suit) wherein the said United States of America is plaintiff and the said Iska W. Carmack, is one of the defendants;

That said statements of facts hereinafter set out shall be received in evidence on the trial of said cause, as aforesaid, as agreed statements of facts;

That this stipulation, signed by the parties hereto, shall be filed with the shorthand reporter, spread upon the record, and annexed to the certificate of the said shorthand reporter to be sworn to before a notary public in accordance with certain stipulations between the parties hereto, signed by said parties and filed with the said shorthand reporter, on the ninth day of November, A. D., 1943, and spread upon the record by agreement between said [fol. 197] parties hereto, on said ninth day of November, A. D., 1943.

Item II. Description of the Property.

That it is agreed by and between the parties hereto that the property sought to be condemned in the above entitled cause by the United States of America, plaintiff herein, as the site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, is located in the town (now city) of Cape Girardeau, Missouri, in the Eastern Judicial District of Missouri, Southeastern Division.

It is further agreed that the property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation, filed in the above entitled cause, is now and has been for many years, devoted to public purposes (the Common Pleas Court House, City Offices, Public Library, and Public Park);

That Post Office Inspector M. J. Deutsch was designated as the Government's only Site Agent to visit said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri, for the purpose of investigating and recommending to the Joint Committee considering the selection of the Post Office, Custom House, and Federal Court Building site at Cape Girardeau, Missouri, an available, suitable,

and fitted site for the construction and maintenance of a [fol. 198] Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

That said Post Office Inspector, M. J. Deutsch, in fact visited the said City of Cape Girardeau, Missouri, from July 23 to 26, 1940, and from July 29 to 31, 1940, during which time the said Post Office Inspector, M. J. Deutsch, investigated each of the twenty-two (22) parcels submitted in response to the advertisement of the United States of America to submit proposals of sites for inspection.

That the said Post Office Inspector, M. J. Deutsch, did, after considering facts pertinent to the site selection for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, make a report to said Joint Committee considering the selection of said site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, wherein said Post Office Inspector, M. J. Deutsch, recommended as his first choice a site other than the public property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause.

That copies of said Site Agent's report, made by said Post Office Inspector M. J. Deutsch, were sent with the letter sent to The Honorable, The Attorney-General of the United States requesting the filing of the Plaintiff's (Sec- [fol. 198a] ond) Amended Petition in Condemnation in the above entitled cause;

That a copy of said report and recommendation of said Post Office Inspector M. J. Deutsch was sent to Harry C. Blanton, United States Attorney of Eastern Judicial District of Missouri, the attorney of record for the United States of America, the plaintiff in the above-entitled cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action File No. 482, and said copy of said report of said Site Agent, Post Office Inspector M. J. Deutsch, is now in the custody of said Harry C. Blanton, United States Attorney.

It is further agreed that the property sought to be condemned by the plaintiff, the United States of America, in

the above-entitled cause is in the nature of a public park upon which is located a Court House used by the Court of Common Pleas of Cape Girardeau County, a Public Library Building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the library building.

The park upon which these structures are located is used for gatherings of the Boy Scouts, and gatherings of various other groups. It is also used as a place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not [fol. 199] only used by the band in giving concerts, but is used for public speakings. The second story of the court house is occupied by the Common Pleas Court, a Judge's Chambers, and a law library for the Court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the clerk of the Court of Common Pleas, the city engineer, the mayor, the city council, and the city attorney. There is a basement in this building used largely for a storage place, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn all the property with the improvements thereon except the library building.

Item IV. Public Library and Public Library Building.

It is agreed by and between the parties hereto that there is now and has been for many years past continuously maintained a public library building in which the said City of Cape Girardeau, Missouri, now and for many years past has continuously maintained a public library for the general public, both as a public library and also additionally as a meeting place for civic organizations such as garden clubs, rose societies, historic societies, and other civic and public gatherings.

All of the real estate on which the above-mentioned pub- [fol. 200] lic library building is located, together with all of the real estate adjacent to said public library building, is included in the description of the property sought to be condemned in the (Second) Amended Petition, in Condemnation, filed by the United States of America, plaintiff, in the above entitled cause in the United States

District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482, wherein the said Iska W. Carmack is one of the defendants;

That the City of Cape Girardeau, Missouri, will be required to vacate said public library building situated on the said real estate sought to be acquired by the United States of America by condemnation in the above-entitled action upon thirty days' notice by the Government, and, upon notice, to remove said Library and Library Building from Government property within a reasonable time.

The land sought to be condemned was originally conveyed with other land in 1807 by its then owner, Louis Lorimier, to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the thirteenth day of January, 1806, to have the Seat of Justice of that District permanently fixed upon his land at that place. The deed contains provisions in the nature of conditions or limitations that the land so given should 'be and remain forever common and public, [fol. 201] and never to be appropriated to private use, agreeably to the explicit intention of the donor.'

Item V. Facts Regarding the Deeds of 1814 and 1820.

It is agreed by and between the parties hereto that in 1814, the Seat of Justice in the meantime (between 1804 and 1814) been removed from Cape Girardeau to Jackson, the Judges of the Court of Common Pleas in form conveyed this tract to the heirs of Louis Lorimier, and on September 11, 1820, all of the heirs of Louis Lorimier, deceased, conveyed the premises by quit claim deed to the inhabitants of the Town of Cape Girardeau collectively 'for their use, benefit and behoof forever.'

This deed conveyed certain other property not here involved, and concluded with the following paragraph:

"Provided always that the several tracts or parcels of land thus granted to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively

intended, and that they, nor any part of them, shall never become private property."

That the said defendant, Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Maria [fol. 202] Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in paragraph Eleventh of Plaintiff's said (Second) Amended Petition in Condemnation.

That said defendant, Iska W. Carmack, is an inhabitant, citizen, taxpayer, and owner of lots in and near the said town (now city) of Cape Girardeau, Missouri.

It is further agreed by and between the parties hereto that the acquisition by the Government by condemnation in the Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause will include all property under and immediately adjacent to the Public Library Building.

Item VI. Agreement to Exchange Property.

That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the Old United States Post Office Building located in said City of Cape Girardeau, Missouri;

[fol. 203] That said City Officials claimed and represented that they based their authority to sell or dispose property upon Section 7210 and 7211 of the Revised Statutes of Missouri 1929;

That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned is based upon said representations as to the right and

authority of the City Officials to sell or dispose property under said Section 7210 and 7211 of the Revised Statutes of Missouri, 1929.

Item VII. Harlan Bartholomew.

Several years ago Harlan Bartholomew of St. Louis, Missouri, a city planning expert, made a plan for the City of Cape Girardeau, Missouri.

Item VIII. Architect.

It is agreed by and between the parties hereto that Associate Architect H. A. Tucker had no authority, and was given no instructions to examine any sites offered at the City of Cape Girardeau, Missouri, other than the site sought to be condemned, for the Post Office, Custom House, And Federal Court Building, but, acting under instructions [fol. 204] dated September 25, 1940, of the said Joint Committee, visited Cape Girardeau between October 1 and October 7, 1940, for the purpose of obtaining such data as necessary to develop studies for utilizing the property sought to be condemned in the Plaintiff's (Second) Amended Petition in Condemnation; and further,

That the said H. A. Tucker had no authority, and was given no instructions to make any investigation of said other sites, and had no authority to make any recommendations to the said Joint Committee regarding the selection of a site for the New Post Office Building, Custom House, and Federal Court Building, at Cape Girardeau, Missouri, and, in fact made none.

Item IX. Liaison Officer.

It is agreed by and between the parties hereto that H. S. Roome, Liaison Officer of the Federal Works Agency, had no authority, and was given no instructions to inspect any sites offered at the City of Cape Girardeau, Missouri, for the Post Office, Custom House, and Federal Court Building, and made none, but, acting under instructions of the Federal Works Administrator, dated November 20, 1940, the said Liaison Officer H. S. Roome conferred with City Officials at Cape Girardeau, Missouri, from Novem-

ber 24 to November 29, 1940, inclusive, for the purpose of [fol. 205] negotiating a mutually satisfactory proposal to be submitted to the Government by the City Officials of Cape Girardeau, Missouri, for the exchange of the property described in Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause, for the old Post Office Building and site.

The said Liaison Officer H. S. Roome agreed with the City Officials of Cape Girardeau, Missouri, on the form of proposal to be submitted to the Government for the exchange of property, but made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

Item X. Petitions of Cape Girardeau, Missouri, Citizens and Taxpayers Filed With the Joint Committee.

That it is agreed by and between the parties hereto that John Sample of Cape Girardeau, Missouri, did, on or about November 19, 1940, cause to be filed a petition with the Joint Committee considering the selection of a site for the Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, signed by six hundred and sixty-seven (667) citizens and property owners of said City of Cape Girardeau, Missouri, protesting any action which would result in part of the said park (prop- [fol. 206] erty sought to be condemned) being used for Federal building purposes.

Item XI. Project Deferred for the Duration.

That it is agreed by and between the parties hereto that the project of constructing a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, has been deferred for the duration of the War, and the City Officials of the said City of Cape Girardeau, Missouri, were notified of said deferment of said project for the duration on February 19, 1942 by the Administrator of Public Works.

Item XII. Recommendation of the Joint Committee.

That said Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, recommend the acceptance of the City's proposal which had been worked out as to form by the said H. S. Roome, Liaison Officer.

The recommended acceptance of the site sought to be condemned by the Joint Committee was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted to occupy the present Federal Building and site at Cape [fol. 207] Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time.

Item XIII. Agreement Does Not Limit Right of Iska W. Carmack to Offer Additional Further Evidence.

It is further agreed by and between the parties hereto that the foregoing statements of facts are to be offered in evidence on the part of the Defendant, Iska W. Carmack, on the trial of the above-entitled cause without prejudice to the right of said Iska W. Carmack to offer further and additional and other testimony regarding any or all of the facts herein set out.

The Parties Hereto Stipulate And Agree as set out in the above and foregoing statements of facts, and in wit- [fol. 208] ness thereof hereunto set their hands and affix

their seals this 9th day of November, A. D., 1943, Washington City, District of Columbia, U. S. A.

UNITED STATES OF AMERICA,
Plaintiff.

By B. J. Hasson, Attorney.
Department of Justice.

ISKA W. CARMACK, Defendant.
By L. Lee Bowman,
Cape Girardeau, Missouri.

and I. R. KELSO, Attorney.
Offices in the First National Bank,
Cape Girardeau, Missouri.

The foregong statemets approved by:

HARRY N. McNERNEY,
Attorney.
Federal Works Agency.

[fol. 209] Certificate.

The foregoing is the identical original copy of stipulation initialled by Howard B. Smith, Shorthand Reporter "H. B. S." and subscribed and sworn to by said Howard B. Smith, Shorthand Reporter on November 22, 1943, consisting of pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and containing Items I, II, (III not being used) IV, V, VI, VII, VIII, IX, X, XI, XII, XIII.

HOWARD B. SMITH,
Reporter.

Sworn to and subscribed before me this 22nd day of November, 1943.

(Seal) MARGARET C. SCOFIELD
Notary Public.

My commission expires Aug. 31st day of Aug. 1948.

[fol. 211] Mr. Kelso: And that is followed by affidavit of the shorthand reporter, which I will not read.

Mr. Kelso: Next, we offer in evidence report of Site Inspector Post Office Department, M. J. Deutsch, dated St. Louis, Missouri, August 20, 1940. It was numbered as Defendant Carmark's exhibit 2/8/44, but it will have to be renumbered.

(The document is marked "Defendant's Exhibit B".)

[fol. 212] (Defendants' Exhibit B—4/18/44 AP.)

Federal Works Agency
Washington.

Office of the Administrator

I hereby certify that the annexed Report of Site Inspection, dated August 20, 1940, and the enclosures mentioned on page 6-A thereof, of M. J. Deutsch, Post Office Inspector and Site Agent, relative to a proposed new site for a Post Office and Court House at Cape Girardeau, Missouri, is a true photostatic copy of the originals thereof on file in the Federal Works Agency.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on this 24th day of November 1943.

Seal
Federal Works
Agency
United States
of America
1939

By direction of the
Federal Works Administrator:
ALAN JOHNSTONE,
General Counsel.
Federal Works Agency

[fol. 213] Report of Site Inspection.

Post Office Department
Office of Inspector

Saint Louis, Missouri.

M. J. Deutsch
Inspector

Case No.

Subject:

August 20, 1940.

Cape Girardeau, Missouri.

Administrator of Federal Works Agency,
(Public Buildings Administration,)
Washington, D. C.

Sir:

In accordance with official instructions dated June 26, 1940, I visited Cape Girardeau, Missouri, from July 23 to July 26, and from July 29 to July 31, inclusive, and inspected all locations suitable and available for the proposed new building at that place.

The Federal Public Building Appropriation Act of 1938 provides for a site and building, the total allocation for the project being undetermined. The estimated amount that can be expended for land is $20,000. The advertisement solicited bids for the sale or donation of a lot or the exchange of the present federal building and site. The approximate dimensions of the lot advertised for are 150′ x 215′ for a corner location, or 175′ x 215′ for an interior location.

General Information.

The town in general is located on what might be termed a bluff overlooking the Mississippi River. Along Broadway, this incline rises about fifty feet from the railroad tracks to Lorimier Street, and west of Lorimier Street it is fairly level. The ground is comparatively hilly at all points north of Broadway, while it is fairly level south of Broadway. The industrial area is spread out over several

sections of the city. The large International Shoe Company plant is in the northeast corner of the town along the St. L & S. F. Railroad tracks. The important Marquette Cement Company is located in the extreme southeast portion of the city, near the same railroad. Several industrial plants have recently located on some low ground in the western part of Cape Girardeau in the vicinity of the Missouri Pacific Railroad tracks. Semi-industrial plants such as automobile agencies, laundry, creamery, filling stations, and farm implement agencies are now concentrating along Sprigg Street between Broadway and [fol. 214] Good Hope Streets. Cape Girardeau, although the largest city in southeast Missouri, is not the seat of the county. The seat of Cape Girardeau County is at Jackson, approximately nine miles west of Cape Girardeau.

The business section of Cape Girardeau is generally regarded as being divided into three distinct units. The most important and most compact shopping development is along Main Street between Broadway and Independence Street. There is then the retail development along Broadway, spread out from Main Street west to Pacific Street. This area is not compact and is interspersed with some residences and vacant lots. The third business section is concentrated on Good Hope Street in the block east of Sprigg Street. The Main Street business section is the oldest and by far the most important and the most concentrated. Business is not expected to expand along Main Street, however, because of topographical limitations. It is generally conceded that future expansion will develop along Broadway, filling in to the west within its present limits. It is significant to note that the local Montgomery Ward retail store recently moved from their location on Broadway near Middle Street to a new location on the east side of Main Street near Themis Street, where they have taken out a long term lease. Close to Montgomery Ward's new quarters on Main Street are located two five and ten cent chain stores, J. C. Penney, and other stores of this nature, many of them with long term leases.

While the most expensive shopping frontage is along Main Street, the most prominent corner in the town is at Broadway and Fountain Street, where are situated four

of the largest buildings in the city, including the present federal building, the six story Marquette Hotel, the six story H. & H. Office building, and the Ivanhoe Hotel Building. In the block occupied by the present post office on Broadway is also the prominent Southeast Missourian building, which is the home of the local daily paper.

Broadway is the principal east and west thoroughfare in the city, connecting with U. S. Highway 61 at the western outskirts of Cape Girardeau, and Sprigg Street is the principal north and south thoroughfare, it being used by traffic crossing the Mississippi River bridge at Morgan Street. There are only two banks in the town, one of them being located on the west side of Main Street, near Themis Street, and the other at the southwest corner of Good Hope and Sprigg Streets. Most of the streets in the town are well paved, but they are commonly comparatively narrow and provide only 56′ or 60′ between property lines.

[fol. 215] The population by census was:

1910— 8,475
1920—10,252
1930—16,227
1940—19,415

The populaiton served by city carriers is estimated to be 17,000.

The total postal receipts by fiscal years have been as follows:

Fiscal	year	ending	June	30,	1910:	$20,529.60.
"	"	"	"	"	1920:	38,978.95.
"	"	"	"	"	1930:	69,784.10.
"	"	"	"	"	1940:	94,199.60.

This post office has a total of 396 lock boxes, of which 354 are now rented.

Cape Girardeau is an industrial city of varied trades. The largest factory is operated by the International Shoe Company with approximately 1500 employees. The Marquette Cement Company employes approximately 500

men. Cape Girardeau is also the location of the Southeast Missouri State Teacher's College, with an enrollment of approximately 1500 students. The receipts of the post office are faily well diversified and there are no unusually large mailers. The largest mailers at present are the Superior Electric Products Corporation, who are located in the western part of the city, and the Southeast Missourian Publishing Company, who are located about 250' east of the present federal building on Broadway.

The town is having good business currently and has shown appreciable increases in population and postal receipts. New homes are being built in the north, west, and the south parts of the city, this being reflected in the recent extension of the city delivery service as shown on the inclosed map. New fronts have been erected to business houses along Mair Street and some new stores have been constructed along west Broadway, including a new theater. The International Harvester Company is building a large implement sales room on Sprigg Street near Merriwether. The agricultural district surrounding Cape Girardeau is also growing and improving. (See attached booklet and mimeographed pamphlet issued by the Chamber of Commerce for fuller data relative to industrial and other statistics.)

[fol. 216] The St. Louis and San Francisco Railroad is the only passenger railroad entering the city and carries all of the mail. About 5% of the mail is dispatched by Star Route to Anna, Illinois, for connection with the Illinois Central Railroad. The Missouri Pacific Railroad operates a branch line to Cape Girardeau for freight service only and carries no mail.

Street cars were eliminated from service in this city several years ago and there is now no public conveyance except for taxi-cabs. All city carriers walk to their routes from the main office. The air mail goes to St. Louis, Missouri, or Memphis, Tennessee. There are no classified stations of this post office.

Rough diagram of city carriers' distribution (by the quarters of the compass) from the present post office loca-

tion, which is regarded as the business center, is shown below. Four carriers have been added to the city delivery force within the last five years. This additional service has been divided about equally in the northeast, west, and southwest parts of the city as shown on the inclosed map.

N.W.	N.E.
924	477
2254	437
S.W.	S.E.

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[fol. 220] Elimination Of Undesirable Sites.

"Too remote"	Bids 15, 15-A, 16, 17, 18, 19, 20, 21, 22.
"Too Small"	" 16, 17, 22.
"Adverse public sentiment	" 15, 15-A, 16, 17, 18, 20, 21.
"Unfavorable topography	" 14.
"Unfavorable surroundings	" 17, 18, 20, 21.
"Not worth price asked	" 14, 15, 15-A, 17, 20, 22.
"Exceeds allotment too greatly	" 15, 15-A, 22.
"Options through agent canceled by direct bids from owners	" 4, 5, 8, 9.

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[fol. 221] Competing Sites

Site No. 1: This site, known as the City Park Site, is offered by the City of Cape Girardeau, Hinkle Statler, mayor, located on the east side of Lorimier, between Broadway and Independence Street. The ground in question has dimensions of 265′ 6″ along Lorimier Street, with a depth of 250′, and there is an additional strip adjoining, 110′ by a depth of 150′. In a separate contract attached to the site proposal the city offered all or such part of this area as may be desired by the Government, in an even exchange for the present Federal building and site in Cape Girardeau. This land is part of a larger area, shown on the inclosed plat, which is used as a city park. Within the dimensions described, the improvements consists of a City Hall and a court house building, a memorial fountain and statute, a frame band-stand, and trees and shrubbery, described in detail on the inclosed planting plan. There are no assessments on this property for taxes, and because of the public character and distinct utilization it is difficult to arrive at a true value. The best estimates that could be secured vary from $50 per front foot to $100 per front foot, these estimates generally being based on value for property across the street. Because of the unusual depth, it is my opinion that it may be given a

[fol. 217]

Sites Inspected

File No.	Bid No.	Owner (Or Agent)	Location	Dimensions	Asking Price
A	1	City of Cape Gir., Hinkle Statler, Mayor	E.side Lorimier betw. Broadway and Independence.	215' x 175' (Minimum)	Trade for Gov't. site
B	No bid	U.S. Gov't, (Owner)	S.E.corner Bdwy. and Fountain	125.5' x 165-175'	
"	2	Herman Bremermann, (Owner)	S. side of Bdwy, adj Gov't. owned site.	93.66' x 173.5'	$15,000.
"	3	Ella M. Drum (Owner)	E.side Fountain adj. Gov't.owned site.	9' x 125'	$1,000
C	4	Morris Gorman (Owner)	W.side Lorimier between Bdwy. and Themis	55' x 142'	$5,000.
"	4-A	"	"	"	"
"	5	Theodore Ochs (Owner)	N.W.corner Lorimier and Themis Sts.	119.25' x 142'	$7,250
"	5-A	"	"	"	$7500.
"	6	Hugh L.Mitchell (Owner)	N.side Themis betw. Lorimier & Fountain	45.9' x 174'	$8,000.
"	7	J. H. Strain (Owner)	N.side Themis betw. Lorimier & Fountain	63' x 174'	$12,500
"	8	W. O. Bowman (Agent)	Not contiguous options		$41,000.
D	9	E.L.Markham (Owner)	E.side Fountain betw. Bdwy and Themis.	66'6" x 125' (irregular)	$4,500.
"	9-A	"	"	"	"

[fol. 218]

D	No bid.	May Greene, et al, (Owners)	N.E.corner Themis & Fountain.	125' x 107'	
E	10	Fred A.Groves, (Agent.)	E.side Sprigg betw. Themis & Bdwy.	100' x 180'	$19,000
			N.side Themis,betw. Sprigg & Frederick.	120' x 61.5'	
"	No bid	First Christian Church (Owners)	N.E.corner Sprigg & Themis	123' x 180' (irregular)	
F	No bid	Wm.Hartung, et al (owners)	N.W.corner Bdwy. and Frederick	90' x 127'	
"	11	Geo.J.Vandeven Executor	W.side of Frederick betw.Broadway and Bellevue Sts.	49.5' x 90'	1,500
"	12	A.E.Bohnsack (Owner & agent)	N.Side Bdwy.betw. Frederick & Sprigg	49' x 127'	$5,950

		et al (owners)	and Frederick		
"	11	Geo.J.Vandeven Executor	W.side of Frederick betw.Broadway and Bellevue Sts.	49.5' x 90'	1,500
"	12	A.E.Bohnsack (Owner & agent)	N.Side Bdwy.betw. Frederick & Sprigg.	45' x 127'	$5,950
"	13	Julius Stern (owner)	"	(45' x 127' (49.5' x 90'	$26,000
G	14	W.O.Bowman (Agent)	N.W.Corner Bdwy and Lorimier	188.65' x 271.67'	$41,500
H.	15	Fred A. Groves (owner)	S.W.corner Sprigg & Themis	152.15' x 180.45'	$52,688
"	15-A	"	"	160' x 180.45'	$[illegible],488
"	16	F.F.Braun, (Agent)	W.side Pacific betw. Bdwy and Bellevue Sts.	120' x 214'	$12,000
"	17	Bess Kilgore G.M.Drum (owners)	S.Side Bdwy. betw. Henderson & Park Aves.	130' x 312'	$26,000
[fol.210] H	18	Ella M.Drum (Owns. & Agent)	N.E.Corner Pacific & Merriwether	180' x 228'	$29,000
"	19	Bd of Education E.L.McClintock, (President)	S.Side Bdwy at intersection of Harmony St.	175.76' x 298' (irregular)	$18,000
	20	J. H. Adams (Owner)	W.Side of Main between Park Drive & Mill St.	165' x 285' (Irregular)	Exchange for Gov't. site.
"	21	J.E.Flentge (Owner)	N.E.corner Sprigg & Merriwether	240.5' x 180' (irregular)	$18,000
"	22	Peoples Oil Co.,R.H.Brady, President & Owner.	N.E.Corner Bdwy & Pacific.	80' x 127'	$40,000

Confidential.

value of at least $100 per front foot. The contract submitted by the city is in part vague and equivocal, providing among other things that the city reserve the right to withdraw their offer either before or after acceptance. However, in a conference held with the mayor and city council, it was indicated that the city is very desirous of making this exchange and intend to ratify any reasonable counter offer made by the Government in connection with this property. In the event this site is selected, the Council agrees to remove the band-stand and to change the location of the memorial fountain to any desired spot and to cooperate in any other ways with respect to the establishment of new approaches and the widening of the street that adjoins. It is contemplated by the city that the Government would select an area of approximately 175′ x 215′ within the plat described, the remaining part of which would continue to be utilized and maintained by the city as a city park.

Advantages: This site has the distinction of being within a public park on a high bluff approximately forty feet above Spanish Street, which would made a new building appear very prominently from the east. Within the dimensions proposed, the land is fairly level, but there are steep slopes on the north, east and south. These slopes are attractively terraced and are provided with concrete steps. This location is about two blocks east and south of the present federal building, the latter being generally regarded as the approximate center of the [fol. 222] business section. Lorimier Street is 60′ wide with a 36′ roadway, but this can be easily widened in the vicinity of the site. An important advantage is that the exchange herein provided for will allow the Government to dispose of the present federal building and site to a mutual advantage. No other acceptable offer for an exchange or sale of the present government property is securable. The city park site is unanimously endorsed by all of the business men on Main Street and those on Broadway west and east of the present federal building. It is also unanimously favored by the city council and the postmaster.

Disadvantages: This location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of future business expansion or growth. A new building here would face a side street with only fair residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it may be necessary to fore-go advantages with respect to necessary approaches and drive-ways.

Site No. 2: This site consists of the present government-owned property on the southeast corner of Broadway and Fountain Street and the adjoining property represented by Bids 2 and 3. The government site has dimensions of 125.5′ along Broadway with a depth of 165.175′, and its value is variously estimated at from $200 to $250 per front foot without regard to the building. It is my opinion that its value is close to $225 per front foot, or about $28,000. Bid No. 2 is offered by Herman Bremermann, owner, adjoining the post office site to the east, with dimensions of 93.66′ on Broadway with a depth of 173.5′, priced at $15,000. This lot is improved with an eight room brick house, in which the owner resides, which is about 65 years old. The owner claims to have been offered $19,000 for this property in 1935. It is generally agreed that the asking price of $15,000 is reasonable. Bid No. 3 is offered by Mrs. Ella M. Drum, adjoining the government site on the south, with 9′ frontage on Broadway with a depth of 125′, priced at $1000. The lot is unimproved and is now rented to a cab company for parking purposes for $60 per year. It is my opinion that this small strip is worth approximately $600, and the owner would no doubt take such a sum if the offer were made. These three units would have a total frontage of approximately 219′ on Broadway and a depth of close to 174′.

Advantages: This is an excellent corner location facing the most prominent intersection in the city and on the principal business street. The center of the business section is not definitely ascertainable because of the diversion caused by the three business sections, but this corner is generally regarded as being the center of the business district. This location is about two blocks north and three

blocks east of what might be designated as the center of delivery and the approximate center of population. It is [fol. 223] directly across the street from the bus depot, the largest office building in the town, and the two principal hotels which are convenient for sessions of the Federal Court. The location is also conveniently situated with regard to the Southeast Missourian Publishing Company and the Missouri Utilities Company, two of the largest mailers in the city. Regardless of the fact that the trend of the business district is toward the west on Broadway, this would remain the principal and the most prominent intersection because of the character of the buildings now standing. The purchase price of the Bremermann property is reasonable, and the strip owned by Drum can no doubt be purchased for approximately $600.

Disadvantages: Public sentiment, while favoring this location, is definitely opposed to the destruction of the present federal building because of the advantage that would accrue to the municipality if an exchange were made to permit the city to secure title to it for a city hall and city court. If this site were to be selected, temporary quarters would be required for the post office and other federal agencies in this building. The surrounding streets are somewhat narrow, although of approximately the same width as other streets in this city, and congested. Because of the congestion, a police ordinance has created Themis Street at this point a one-way street. The ground may be considered as comparatively level, but is from 4′ 6″ to 5′ 6″ above the level of the sidewalk. The lot elevation on other property in this block facing Broadway has been cut down to the sidewalk level.

Site Nos. 4-A, 5-A, 6, and 7: These four pieces must be considered together as they are too small individually, submitted by the owners, located on the northwest corner of Themis and Lorimier Streets, with total dimensions of 174.25′ on Lorimier and 230.666′ on Themis Street, the total price being $33,000.

Site 4-A: This is submitted by Morris Gorman, with dimensions of 55′ x 142′, priced at $5,000. It is improved with a building approximately 60 years old in which the owner resides and which is not considered as having any value for sale purposes. Three years ago, the owner

offered this property for $3500, but could find no purchaser. It is generally regarded that a fair value for the property is $3500.

Site No. 5-A: Offered by Theodore Oehs, with dimensions of 119.25′ along Lorimier Street and 126.76′ along Themis Street, priced at $7500. This property is also improved with a very old brick residence, rented to two families for $180 per year. The building is admitted by the owner as not having any value for sale purposes. The owner paid $8500 for this property in 1923. The assessment on this property, $6000, is much higher in proportion [fol. 224] to the actual value than on other property in the city. It should be noted that the west 16.23′ of this land is subject to an easement for a right-of-way from the property owned by M. Gorman (Bid 4-A). The owner had previously submitted Bid No. 5 in the form of an option through an agent with a price of $7250, but he changed the asking price to $7500 in Bid 5-A in order to be reimbursed for abstract of title that will be necessary which had not been included under the original option. It is generally agreed that this property is worth from $7000 to $7500, and it is my opinion that the owner will take $7250 if that offer were made unconditionally.

Bid No. 6: This is submitted by Hugh L. Mitchell, owner, with dimensions of 45.9′ x 174′, priced at $8000. This lot is improved with a one-story brick residence occupied by the owner. The original house is 100 years old, but has been completely rebuilt within the last five years, except for the walls, and completely modernized. The owner bought this property for $2200 five years ago and claims to have spent $5800 since the purchase on improvements. Various eestimates placed this property at a value of from $5000 to $7500. The lower estimates are due mainly to the fact that the appraisers were either unfamiliar with the value of the improvements or did not regard them as being consistent with other value. It is my opinion that this property could not be purchased for less than about $7500 even under condemnation.

Bid No. 7: Offered by J. H. Strain, with dimensions of 63′ on Themis with a depth of 174′, priced at $12,500. This property is improved with a two-story frame residence

having eight rooms, occupied by the owner. An addition was constructed recently to house a beauty parlor operated by the wife of the owner, and other improvements made to the property to the value of approximately $2200. Present owner secured the property in an exchange about three years ago. The value is variously estimated at from $7000 to $10,000. It is my opinion that the land is worth about $3500 and the building about $5000, or a total of $8500 for the property. There are two mortgages on this parcel, one at $3000, and one at $2700.

Advantages: This is a corner location across the street from the city park, approximately one block south and one block east of what is regarded as the business center. The dimensions are about ideal.

Disadvantages: Neither Themis Street nor Lorimier Street are important thoroughfares, Themis being 56′ between property lines with a 37′ concerete roadway. The Gorman, Mitchell, and Strain properties are priced too high and it may be necessary to condemn them to secure them at a proper price. The elevations are irregular, some of it having been cut down to a level with the sidewalk and [fol. 225] in places varying from 3′ to 5′ above. The average elevation is probably about 2′ 6″ above the street level. This location is at some distance from the center of delivery and population and is not in the trend of business expansion.

Site No. 9, in combination with Site No. 3, Site No. 7, and the May Greene property, all to be considered together to create a site of satisfactory dimensions: Located on the northeast corner of Themis and Fountain Street with dimensions of 188′ on Themis and 182′ along Fountain Street. Estimating about $10,000 value on the Greene property, on which no bid could be secured, the total asking price is $27,500. Bids No. 3 and 7 have been previously described.

Bid No. 9-A: This is an inside lot with a frontage of 66′ 6″ x 125′. The southeast corner of this lot with dimensions of 30′ x 36′ 6″ is in dispute and its ownership is not definitely determinable but is presumed to be owned by Mrs. Ella M. Drum, Bid No. 3. This bid is offered by E. L. Markham, owner, for $4500. The lot is unimproved,

a frame residence having burned down several months ago. The assessment on this property, $3080, includes the building that had been destroyed by fire. It is generally estimated that this property is worth at least $4500 as it has possibilities for business improvement. The corner portion of this location, known as the May Greene property, has dimensions of 106′ 6″ along Fountain and 125′ along Themis, and is improved with a dwelling in which the owner resides. The residence is thought to be 70 or 80 years old and has no practical value for sale purposes. The property is thought to have a value of approximately $100 per front foot along Fountain Street, or about $10,000. The property is actually owned by the heirs of Ruth O. Donohue, there being a life estate in May Greene, the remainder men being George H. Greene, Mrs. Nell Necodemus, Florence and Herbert O'Donohue, and S. B. Cunningham. Miss Greene, the life tenant, is in the hospital seriously ill and she could not be contacted. Mrs. Nell Necodemus informed me that the family positively does not desire to sell the property because of sentimental reasons, it having been the home of Miss Greene, the life tenant, for 70 years. Miss Greene has been a teacher in the public schools at Cape Girardeau for over fifty years and for this reason she is held in very high regard by the populace. While there is considerable public sentiment favoring this location for a federal building, there is anticipated much opposition from the admirers of Miss Greene against any resort to condemnation proceedings to secure the latter property.

Advantages: This location adjoins the present federal building, close to that is regarded as the center of the business section and the most prominent corner in the town. If the city would take over the present federal building for a city hall and city court house, a new building on this site would create a civic center in this vicinity. [fol. 226] This corner has considerable public sentiment in its favor, particularly because it would maintain the status quo with regard to proximity to the three business districts.

Disadvantages: The surrounding streets, while standard in width, are relatively narrow with only a 37′ paved roadway. The land is irregular in elevation with an

average of about 2½′ to 3′ above the street level. Condemnation would appear to be necessary to secure the Greene property in opposition to considerable sentiment in favor of Miss Greene. Condemnation would also appear necessary against the Strain property (Bid No. 7) to secure it for a fair price of around $8500. The asking price for the total area, $28,000, (assuming $10,000 for the Greene property) is not attractive.

Site No. 10: Offered by Fred A. Groves, agent, located on the east side of Sprigg, near Themis, and the north side of Themis near Sprigg. Four distinct parcels are included in the Groves offer, including the Ed Hunze property, 50′ x 180′, for $5000; the Fred Frenzel property, 50′ x 180′, priced at $4000; the Morris Samuels property, 60′ x 60′ 6″, priced at $6000; and the L. E. Rhoads property, 60′ x 61′ 6″, priced at $4000; the total price on these tracts being $19,000. Not included in the Groves offer is a corner tract on which no bid is securable, owned by the First Christian Church, with dimensions of 123′ on Sprigg Street and 60′ on Themis Street, irregular. The Frenzel property is improved with a 1½ story brick residence, 50 years old, now rented at the rate of $312 per year. The asking price of $4000 on this parcel is considered reasonable. The Hunze property is improved with a residence that is identical to the Frenzel residence, tenanted by the owner. The asking price of $5000 on this parcel is $1000 too high. The Rhoads property, 60′ x 61′ 6″, was owned by the HOLC and sold several weeks ago to the present owner for $2500. The HOLC appraised this parcel at $1250 for the land and $1250 for the building. It is believed a reasonable price on this parcel now is about $2800. The Samuels property is improved with a good brick residence in which the owner resides. It is believed that the Samuels lot is worth the same as the Rhoads lot, or $1250, and the building is worth about $3800, or a total of $5050 for this property. The church property is improved with a brick church building on the corner portion and a two-story frame residence on their inside lot. Mr. Clyde Harris, president of the First National Bank, fiscal representative for the First Christian Church, stated that a recent appraisal was made on the church property, which established the value at approximately $125 per front foot

or about $15,000 for the entire property. It is understood that the improvements owned by the church are in very poor condition and that the church people are contemplating the construction of a new building. While the [fol. 227] trustees of the church would take no action to submit a bid, Mr. Harris stated that they would probably favor an offer of about $15,000 from the Government for their property. It is my opinion that this parcel is appraised too high and that a liberal price would be about $12,000. The total area covered by the above pieces would have a frontage of 223′ along Sprigg Street and 180′ along Themis Street. It is my opinion that the total cost for the entire site should not exceed $27,850.

Advantages: This is a corner location, facing Sprigg Street, which is the most prominent north and south street in the city with heavy traffic going to and from the Mississippi River bridge. It is close to the center of population and center of the delivery district, but about four blocks from what may be considered as the center of the business section. Sprigg Street has good possibilities for business growth, but thus far has developed only into a semi-manufacturing street from Broadway to Good Hope Street with many filling stations as a result of heavy through traffic. The site is comparatively level, and no construction difficulties are ascertainable. There is some public sentiment in favor of this location particularly from the business men on Good Hope Street and those on West Broadway.

Disadvantages: The surroundings are only fair, with two filling stations and the Grove Auto Agency (Site 15) occupying the opposite corners, and the rear of the business houses facing Broadway to the north, the latter being very objectionable. Sprigg Street, although wider than most of the streets in town, has only a 40′ concerete roadway. Except for the Frenzel property, all of the other parcels are priced too high, and no bid is securable from the First Christitan Church.

Site No. 11, 12, 13, and the Hartung estate: These four parcels constitute a corner location with dimensions of 176.5′ along Frederick Street and 180′ along Broadway, offered by the owners for $50,450, assuming a value of

$17,000 on the Hartung portion on which no bid was securable. Bid No. 11, submitted by George J. Vandeven, executor, has a frontage of 49′ 6″ on Frederick Street with a depth of 90′, improved with a one-story residence, reasonably priced at $1500. Bid No. 12 is a vacant lot with a frontage of 45′ on Frederick Street with a depth of 65′, priced at $5950, but worth only about $5000. Bid No. 13 has a frontage of 45′ on Broadway with a depth of 176′ 6″, irregular, improved with a three story brick building that is now used as a wholesale fruit and vegetable warehouse. The price on the property, $26,000, is about $9000 too high, the bid being submitted by Julius Stern, the owner. The corner portion of this site with 90′ on Broadway with a depth of 127′ along Frederick, is owned by William Hartung and others, improved with a small one-story brick gun-shop establishment and a one-story residence. The owners refused to submit a bid and claimed that the [fol. 228] property is worth approximately $22,500, which in my opinion is about $5,000 too high.

Advantages: This is a corner location facing the principal street, Broadway, about two blocks west of the accepted center of business and about two blocks north and east from the centers of delivery and population. It has some sentiment in its favor particularly from the business men on West Broadway and the business men on Good Hope Street.

Disadvantages: The price is considerably above the allotment and the asking price is unreasonable. No bid is securable on the Hartung property, which in my opinion could not be condemned for less than about $17,000. The elevations are very objectionable, the rear of the site being approximately 13′ or 14′ above the Broadway street level. Frederick Street slopes upward to the north at a reasonable grade of only about 2%, but the alley along the west line of this property slopes about 8% upward to the north.

The above valuations are a consensus of opinion expressed by the following real estate experts of this city:

William Deevers, President, Southeast Loan Ass'n.

Robert Vogelsang, President, Farmers & Merchants Bank.

F. F. Braun, Braun Realty Company.

Earle Granling, President, Cape Girardeau Loan Ass'n.

W. O. Bowman, Bowman Realty Co.

F. A. Groves, business man.

Clyde Harris, President, First National Bank.

Considering the relative merits and the deterring features of the competing sites, I would give preference to the first three in the following order:

First Choice—Present Government-owned site, including Bid Nos. 2 and 3.

Second Choice—Site No. 1, the city-owned park.

Third Choice—The northeast corner of Themis and Fountain Streets, including the Greene corner, and Bid Nos. 3, 7, and 9-A.

It is my opinion that the present Government-owned site and adjoining ground is the most outstanding location in the city. Any of the other sites would be merely a com- [fol. 229] promise to avoid the demolition of the present federal building. While due regard must be given to public sentiment, it is obvious that the city park site, while it might provide an attractive setting, would present a problem to develop for practical utilization. The third choice would make a fairly suitable site, especially in the event that the present federal building would remain, but the lack of a bid from Miss Greene and the sentiment in her favor against condemnation is a serious obstacle.

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[fol. 230] Sales Data.

Assessed Valuations: A state law provides for assessments to be made at full value. There is a joint statement in the file in which the city and the county assessors indicate that they "endeavor to assess all property, both real and personal, at its true value." This statement is disputed by the actual facts, however, as indicated in some comparisons below. For example, a piece of property on Broadway sold recently for $4500 was currently assessed at only $800; the Hartung estate, for which the owners ask approximately $22,000, is assessed at only $4280; Site No. 11, offered for $1500, is assessed at $960. From these

examples, it is my opinion that no reasonable comparisons can be made between the assessed valuations and the actual value.

Sales in the vicinity of the business section within recent years have varied considerably, these being given in the following paragraph.

South side of Broadway between Main and Spanish Streets, $100 per front foot for lot 30′ x 89′, and old building of nominal value, selling price $3000 six months ago.

South side of Broadway between Pacific and Broadway School (Site No. 19) 85′ on Broadway and 120′ deep, sold for $100 per front foot or $8500—old building on lot considered worthless.

South side of Broadway between Ellis and Sprigg, 30′ x 112′, sold for $150 per front foot, or $4500. Current assessment is $800.

Northwest corner Broadway and Ellis was purchased by Bell Telephone Company ten years ago for $18,000, 90′ on Broadway, 128′ deep.

East side Sprigg between Independence and Merriwether, adjoining Site 21, sold for $40 per front foot or $4,480 for vacant lot 112′ x 180′. Current assessment on this property was $1900.

North side of Broadway between Lorimier and Fountain, 44′ on Broadway and 231′ deep, sold for $5000. Forced sale to close estate in 1935. Considered very low price.

North side of Broadway between Fountain and Middle, 70′ on Broadway and 233′ deep, sold for $30,000 including good two-story brick building 70′ wide. Sale in 1937.

Northeast corner Broadway and Lorimier, 70′ on Broadway and 131.5′ deep sold for $6000 in 1940—no improvements.

North side of Broadway between Fountain and Middle Streets, 50′ on Broadway and 233′ deep sold for $12,000 in-
[fol. 231] cluding one-story brick garage building 50′ wide, 1939.

The following named real estate experts could qualify as witnesses to testify to the values on the several properties as shown below. With the exception of Mr. William Deevers, however, they say that they would not voluntarily offer to testify in behalf of the Government.

Bid No.	W.O.Bowman	F.A.Groves	Earl Granling	Robert Vogelsang	Wm.Deevers	F.F.Braun
1 (City park)				$100 per front foot	$55 per front foot	$70 per front foot
Gov'T.site	$31,250			$28,125	$25,000	
2 (Bremermann)	$15,000	$15,000	$15.000	$15,000	$14,000	$15,000
3 (Drum 9x125')	$900				$600	$700
4-A (Gorman)	$3500		$3500	$3000		$3500
5-A (Ochs)	$7500		$7500	$7000	$7000	$7000
6 (Mitchell)	$7000	$7500	$6000	$5000	$5600	$6000
7 (Strain)	$7000			$8500	$9500	$10,000
9-A (Markham)	$4500	$5000	$5000	$5000		$4500
May Greene	$11,000		$10,000	$10,000	$10,000	$10,000
10 (Groves Agt)		$16,000				$17,000
Christian Church		$13,500			$8,000	$15,000
11 (Vandeven					$1500	
12 (Bohnsack)					$4000	$5750
[fol. 232] 13 (Stern)					$15,000	$17,500
Hartung			$17,000		$15,000	$18,000

Note: *Government site quotations are for ground only.

Confidential.

[fol. 233] Public Sentiment.

The confused and divided public sentiment is readily ascertainable from a number of inclosed clippings from the local daily paper. In general, the business men on Main Street and East Broadway favor a location east of Fountain Street, and the business men on West Broadway and on Good Hope favor a location west of Fountain Street.

Sites No. 2 and 3, including the government-owned site, is generally regarded as the outstanding location. For practical purposes, it is believed that this site would suit every faction in the town, but there would be serious objection interposed to the razing of the present federal building.

There is considerable public sentiment in favor of the northeast corner of Themis and Fountain Streets, including the Greene corner and Bids 3, 7, and 9-A. This site would suit most of the business men as it would not change the status quo inasmuch as it would adjoin the present federal building. There would be considerable objection to the condemnation of the Greene property because of the personal esteem shown by the citizens for the life tenant.

Site No. 1, the city park property, is actively favored by the City Council, and almost unanimously favored by the business men on Main Street. It is pointed out that the proposed exchange would give the Federal Government a very prominent location in attractive surroundings, while the city would secure an excellent building for its city offices and city court, of which it is in need, without expense. On the other hand, there is considerable objection to this site because it is claimed that it would destroy the utility of the park which is a great asset to the city, and the city library north of this location would show up poorly in contrast if the new federal building were erected here.

Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. The president of the Chamber of Commerce decided not to give an opinion as to his preference.

The postmaster, who has no financial or personal interest in any of the locations, but who is conscientiously interested in civic development, regards the government-owned site as an outstanding location but recommends the city park as first choice because this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings. As a second choice, in the event that a trade with the city is not feasible, the postmaster prefers the present government-owned site.

[fol. 234] Particular attention is called to the enclosed communication from a prominent citizen, Mr. I. R. Kelso, dated Aug. 19, 1940, with which is submitted a list of business men who had signed a statement promising cooperation with the Government relative to any site that may be selected; and also calling attention to the objections relative the city park site and the First Christian Church corner.

Expiring Offers: The options given to the agent submitting Bid No. 10, copies of which are enclosed with the bid, expire on December 31, 1940.

The options submitted by the agent in Bid No. 14, inclosed with the bid, expire on November 15, 1940.

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[fol. 235] Recommendation.

For First Choice I recommend that the present government-owned site be retained and that the adjoining property, Site 2 offered by H. Bermermann be purchased for $15,000, and that a counter offer be made to the owner of Site 3, Ella M. Drum to purchase this site for $600.

This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction.

For Second Choice I have selected Site No. 1, the city-owned park, which could be developed into an attractive setting for the new building, and which could no doubt be

secured in an exchange resulting in mutual benefit to the city and Government. The bid submitted by the City is not intended to be a final offer, and it is expected that after a review of the facts by the Site Committee a counter-offer could be made with respect to a definite area of about 175′ x 215′ within the park grounds and with respect to improvements in surrounding approaches, removal of trees and fountain, and demolition of present city building. The mayor and city council verbally agreed to favor any reasonable counter-offer to be made by the Government. It is my opinion that the government-owned site is valued at approximately $225 per front foot, whereas the park site has a value of about $100 per front foot, and this must be taken into consideration in submitting a counter-offer. The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade.

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(Part of Defendants' Exhibit B.)

Cape Girardeau, Missouri.

DIRECTED INTERVIEWS: None.

Respectfully submitted,

Post Office Inspector,
Site Agent.

Recommendation of the Joint Committee on Public Buildings.

Site No. 1-B

Property offered by City of Cape Girardeau.

Dimensions. 280'x240'

Price $ Exchange for present owned Federal property as per Act approved 11-26-1940.

We recommend the acquisition of the above property

By: Exchange

Date April 7, 1941

Joint Committee on Public Buildings.

CONFIDENTIAL

COMPETING SITES—CHARACTERISTICS

(REVISED)

Cape Girardeau, Missouri — Post Office and Courthouse
(City) (State) (Building)

(BIND THIS SHEET WITH REPORT) After careful examination of the properties and inquiry of local builders, municipal officials, etc., the Site Agent will furnish hereon the following detailed information concerning the site recommended by him, and such other site as appears to be desirable as an alternative selection. (Use same number for bid as given in synopsis.)	FIRST Bid No. 2, 3, & Gov't Offered by Bremermann etal Size 219 by 174 ft. Price, $ 16,000	SECOND Bid No. 1 Offered by City Size 175 by 215 ft. Price, $ Exchange
FOUNDATIONS: State probable character of substrata (rock, clay, sand, etc.)	Sand	Sand
Is any part of site filled ground?	No	No
Have local builders encountered quicksand near any of these points?	No	No
Do brick or stone buildings nearby show signs of settlement?	No	No
Is there any condition present which would make secure foundations unusually expensive?	None known	None known
State approximate depth to rock below a designated point of site	Unknown	Unknown
DAMPNESS: Is site exposed to flood water from streams?	No	No
Are the basements of nearby buildings damp?	No	No
GRADE: Give grade of general surface of lot above or below streets	4'	See plat
If established grades of streets around lot are not level, state (approximately) their inclination, and whether street corner is the highest or lowest point or show approximate elevations of site and surrounding streets and alleys on site plat	Level	See plat
ARE PUBLIC FACILITIES, as follows, available at each site? Water?	Yes	Yes
Gas (natural or artificial)?	Yes	Yes
Electric light?	Yes	Yes
Electric power?	Yes	Yes
Street mains for heating?	No	No
DRAINAGE: Give distance from each site to most accessible sewer, and whether sewer is public or private	Public	Public
Sewer is in middle of adjoining street in both sites		
State sewer's diameter (in inches), and depth of the bottom of the inside of the sewer below surface of street or alley	10' deep 8" pipe	7' deep 8" pipe
PAVEMENT: With what material are abutting streets paved?	Concrete	Asphalt
What is width of paving between curbs?	Bdwy, 38' Fountain 41'	Lorimier, 36'
FIRE LIMIT: State widths of abutting streets between property lines	Bdwy, 56' Fountain, 60'	Lorimier, 60'
State widths of abutting alleys and whether each alley is public or private	No alleys	No alleys
With what material are abutting alleys paved?		
PRINCIPAL STREET: On which street should the new building front?	Broadway	Lorimier

(Part of Defendants'

is public or private	Public	Public
Sewer is in middle of adjoining street in both sites		
State sewer's diameter (in inches), and depth of the bottom of the inside of the sewer below surface of street or alley	10' deep 8" pipe	7' deep 8" pipe
PAVEMENT: With what material are abutting streets paved?	Concrete	Asphalt
What is width of paving between curbs?	Bdwy. 38' Fountain 41'	Lorimier 36'
FIRE LIMIT: State widths of abutting streets between property lines	Bdwy. 56' Fountain. 60'	Lorimier. 60'
State widths of abutting alleys and whether each alley is public or private	No alleys	No alleys
With what material are abutting alleys paved?		
PRINCIPAL STREET: On which street should the new building front?	Broadway	Lorimier
TITLE: If owner does not claim to have a clear title, state briefly principal defects in the title	Clear	See report
IMPROVEMENTS: On the back hereof give value and a brief description of existing buildings, etc., and any DRAWBACKS affecting the desirability or usefulness of either site. Does the Government now lease any part of this site?	Gov't-owned site included.	No
REPUTABILITY: State generally whether the character of the buildings and the nature of the businesses, etc., in immediate vicinity of each site are objectionable	No	No
VALUATIONS: State assessed valuation of each site ~~land~~ total ~~Buildings~~	No.2: $5,980 No.3: $ 180	None
Give ratio of assessed value to market value 30 to 50% percent. [Get signed statement from assessor as to both assessed values and ratio.]		
Judged by prices paid for property in these respective neighborhoods within last 2 or 3 years, about what is fair value of each site?	See report	See report
If you recommended condemnation, state amount of damages likely to be awarded (reasons for believing condemnation best must be stated in report)	See report	See report

AMPLIFY IN NARRATIVE REPORT IF CONDITIONS REQUIRE (over)

CONFIDENTIAL

Part of Defendants' Exhibit B.)

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IMPROVEMENTS now standing on land

First Government building and site included.
Site No. 2: 2-story brick residence, 65 years old. Valued nominally at $1,000.
Site No. 3: No improvements.

Second Statue and fountain, band stand, and City Hall and Courthouse building. No value on building. Statue, fountain, and bandstand may be removed.

DRAWBACKS: Here describe briefly any circumstances (not elsewhere herein set forth) affecting the desirability or use of either site, such as—

	FIRST CHOICE	SECOND CHOICE
1. Sewer, gas, or water pipes, conduits, etc., under site (give location and depth and terms permitting such occupancy)	None except for use of owners.	None except for use of owners.
2. Any party wall?	No	No
3. Wires across site?	No	Yes
4. Any walls, areas, cornices, awnings, fences, etc., encroaching on this site?	No	No
5. If site is under lease, state expiration thereof and rent paid thereunder	No	No
6. If site is undermined or subject to mineral rights, state facts	No undermining	No undermining

REMARKS

(Part of Defendants' Exhibit B.)

[fol. 239] (Part of Defendants' Exhibit B.)

Pewaukee, Wisconsin
Lakeside Hotel,
August 19, 1940

Mr. M. J. Deutsch
Federal Agent,
Federal Building,
St. Louis, Mo.

Re: Cape Girardeau
Federal Building Site

Dear Mr. Deutsch:

This is to advise that I am today transmitting to Hon. W. E. Reynolds, Commissioner of Public Buildings, a communication dated August 9, 1940, signed by citizens of Cape Girardeau, all of whom are business and professional men and women calling attention particularly to those doing business on Good Hope, Broadway and Main Streets, copy of which is enclosed herewith for your information and files in connection with the above matter.

Because of your familiarity with local conditions, I am certain that you will agree that the enclosure assures the government of the cooperation and support of the business and professional men and women of Cape Girardeau city wide in scope in the government's effort to select a suitable site as speedily as possible.

As explained to you at the time of your visit to my Cape Girardeau office in connection with the above matter, I am anxious to do everything that I possibly can to avoid factional controversies and sectional issues regarding the matter of selection of a suitable site.

It is unnecessary to burden this letter by calling attention to the names of the signers. However, I deem it proper to call attention to the fact that the above mentioned communication is not in any sense an ordinary petition. Every signer is a business or professional person who is vitally interested in the subject matter of the communication.

You will note that the communication is signed by all of the persons referred to at the time of our conference as

"Main Street group." It is also signed by business and professional people on Good Hope Street and Broadway, who signed protests against the selection of the so-called Court House site.

I deem it proper to call attention to the fact that a number of the signers of the above mentioned communication are desirous of urging their protests against the selection [fol. 240] of the Court House site. I do not want their action in signing the above communication construed as a waiver of their protest. In other words, the signers of the above communication make an unqualified pledge to favor any site which the government may select and to cooperate with the government in acquiring by purchase or condemnation, any site selected without waiving their objections to the Court House site pending final decision of the government in the matter of selecting a satisfactory site.

Yours truly,

I. R. KELSO,

Cape Girardeau, Mo.

P.S.—I am enclosing herewith copy of my letter of August 10 to Hon. Hinkle Statler, Mayor, Cape Girardeau, Mo.

[fol. 241] Cape Girardeau, Missouri
August 9, 1940

Federal Works Agency,
Public Buildings Administration,
W. E. Reynolds, Commissioner
of Public Buildings,
Washington, D. C.

The undersigned citizens of the City of Cape Girardeau, Missouri, do hereby make the representations, pledges and promises hereinafter set out, to the Federal Works Agency, Postoffice Department, Justice Department and the Treasury Department:

First: That it is to the best interests of the City of Cape Girardeau and to all interested agencies and departments of the Federal Government, for the Government to

speedily select a suitable site and to commence the construction of a new Federal Building in the City of Cape Girardeau without delay.

Second: That in order to assure the Federal Government of our cooperation and support in the matter of selecting a suitable site, we hereby agree and pledge ourselves to favor whatever site the Government, in its wisdom, might select for a new Federal Building.

Third: That we will cooperate with the Federal Government in every way possible in acquiring by purchase or condemnation whatever site the government may select.

Name	Address	Business
Clyde D. Harris	117 N. Main St.	President, The First National Bank
R. E. L. Lamkin	130-32 N. Main	President, Buckner Ragsdale Clo. Co.
V. J. Clemens	137 N. Main	Jeweler, Clemens Jewelry Store.
H. J. Clemens	806 William St.	
Emmett C. Dohogne	205 S. Middle St.	
C. A. Vandivort	112 Main St.	Insurance
Edw. J. Bauerle	835 Alta Vista	Secretary, Cape Girardeau B. & L. Ass'n.
E. G. Gramling	St. Charles Hotel	President, Cape Gir. Building & Loan Ass'n.
Oscar A. Knehans	107 Broadway	Attorney
Giboney Houck		Attorney
Benson C. Hardesty	325 N. Lorimier	Lawyer
Chas. L. Harrison	330 N. Lorimier	Contractor
L. F. Popp	Cape Rock Drive	Real Estate and Insurance
John W. Popp	1608 Themis St.	Real Estate & Insurance
J. Albert Uhl	610 William St.	With Cape Gir. Bldg. & Loan Ass'n
H. W. Grossheider	1748 Lacy	Teller, First National Bank
H. O. Grauel	Cheney Hall	Professor of English, S.E.M.T. College
Albert Schultz	319 N. Louisiana	Teller, The First National Bank
Thekla Schack	422 N. Frederick	Clerk, Cape Gir. Bldg. & Loan Ass'n.
[fol. 242]		
Lucille Fuerth	102 N. Main St.	Secretary
E. C. Smith	927 College Hill	Secretary, Kelso Oil Company
Mark A. Statler	389 N. Henderson	Filling Station
J. T. Nelson	230 S. Middle	Filling Station
Richard Werner	1200 Good Hope	Filling Station
V. W. Dyer	621 Merriwether	Auto Dealer
G. E. Hartle	124 N. Henderson	
John Wilson	343 N. Henderson	
L. P. Hutson	343 N. Henderson	

C. L. Hite	1447 Broadway	Auto Loan Dept., The First National Bank
C. A. Himmelberger	325 N. Sprigg	President, S. E. Missouri Lumber Co.
Thos. G. Harris	232 Broadway	Dodge & Plymouth Agency
H. Bremermann	325 Broadway	Cashier, The First National Bank
Herbert Suedekum	1622 Luce St.	Bookkeeper, The First National Bank
Joe N. Haas	414 So. Hanover	Bookkeeper, The First National Bank
Maurice G. Bohnsack	19 N. Main St.	Bohnsack's Clo. Company
W. C. Bahn	10-14 Main St.	Member, Bahn Bros. Hardware Co.
L. J. Bahn	10-14 Main St.	Member, Bahn Bros. Hardware Co.
A. A. Bollack	Secy-Treas.	Sec.-Treas., Central Packing Co.
H. F. Tupper	Marquette Hotel	Manager, Marquette Hotel
E. L. Markham	465 N. Pacific	Contractor
D. M. Scivally	239 N. Henderson	Cape Special Road District
C. W. Boutin	800 Broadway	President, S. E. Mo. Telephone Co.
L. A. Hoffman	10 N. Ellis	Agent, Mo. Pacific Railroad
H. A. Nussbaum	221 N. Ellis	Chairman, Farmers & Merchants Bank
Wm. J. Kies	405 S. Ellis	President, Riverside Lumber Co.
W. E. Walker	127 N. Main	Insurance
W. O. Bowman	327 N. Ellis	Real Estate
E. M. Pickens	1425 Whitner	Contractor
R. E. Reimann	1101 Good Hope	Bookkeeper, E. C. Robinson Lumber Co.
G. A. Seabaugh	1027 N. Boulevard	Carpenter
A. F. Huters	1432 William	With Southeast Missouri Lumber Co.
I. L. Fisher	430 Frederick	Salesman
E. A. Kain	R. F. D. #2	
W. D. McCrite	225 S. Spanish	Carpenter
[fol. 243]		
John A. Montgomery	1502 Independence	Salesman
Mary Ellen Stallings	521a Broadway	Stenographer
Champ Green	1207 Good Hope	
Tony Seabaugh	724 Jefferson	
C. E. Byrd	1403 Bloomfield	
Aug. Bohle	134 S. Pacific	
Jack E. Asinger	1423 Whitener	Salesman
G. F. Golightly	420 S. Sprigg	Sheet Metal
Chas. Simpher	925 So. Ellis	
Glenn Bishop	1117 N. Fountain	Draftsman
A. J. Brennecke	1502 N. Blvd.	Carpenter
C. H. Weil	1119 Cousin St.	Contractor
Donald D. Black	331 Bellevue	Insurance
P. J. Newell	1137 S. Pacific	
H. F. Bode	212 N. Park	
James A. Kinder	627 Good Hope	Kinders Drug Store
George W. Walker	627 Good Hope	Physician
S. D. Nunley	627 Good Hope	Druggist

W. H. Oberheide	830 Alta Vista	Cashier Farmers & Merchants Bank
Robert Vogelsang	825 Independence	President, Farmers & Merchants Bank
A. R. Zoelsmann	534 Washington Ave.	Sec-Treas., Kimbel Lines, Inc.
C. J. Strom	415 Broadway	Strom's News Agency
Fred A. Groves	Sprigg & Themis	Auto (Ford) Dealer
O. L. Seabaugh	709 Broadway	Physician
Anton Haas	217 S. Sprigg St.	Contractor
Joe L. Moseley	801 Broadway	Optometrist
W. A. Buckner	123 N. Henderson	Teacher
Frank W. Hall., M. D.	826 Themis	Physician
G. A. Reynolds, M. D.	826 Themis	Physician
A. J. Rasche	826 Themis	Dentist
M. H. Shelby	826 Themis	Physician
E. H. Vandeven	403 So. Hanover	Merchant
[fol. 244]		
Claude W. Miller	408 S. Hanover	Grocer
Frank Wulfers	902 Broadway	Wulfers Bros. Mkt.
F. X. Roth	907 Broadway	Roth Motor Co.
C. L. Cherry	814 Broadway	Florist
Chas. D. Bauerle	1441 Luce St.	Furniture Store
Phil C. Haman	309a Broadway	Pharmacist
Wm. H. Vedder	611 Broadway	Rug Store
J. H. Ulrich	308 N. Frederick St.	Clerk, Wm. Vedder Rug Co.
W. B. Rust	809 N. Henderson	Upholstering Shop
H. V. Ashley, M. D.	711 Broadway	Physician
Eddie Seehausen	627 Broadway	Meat Market
Chas. J. Rigdon	18 N. Sprigg	Rigdon's Laundry & Cleaning Service
Frank M. Finney	709 Broadway	Druggist
A. W. Berry	215 S. Louisiana	Telephone—Gen. Plant Supt.
Ben Dietrich	501 Washington	Coal
Wm. M. Blair	910 Broadway	Confectioner
Claude R. Juden	813 Broadway	Music Store
Wm. G. Maier	733 Broadway	Tires & Radios
Ernest W. Miller	353 N. Park	Tires & Batteries
A. H. Fick	731 Broadway	Grocer
Glenn C. Hope	725 Broadway	Auto Sales
Joe G. Howell	536 Broadway	Funeral Directors
E. O. Happel	521 Broadway	Grocer
Richard L. Hirsch	516 Broadway	Radio Service
R. H. Perdue	525 Broadway	Rem. Rand Inc.
E. O. Clifton	715 Broadway	Men's Clothing Store
Chris Bauer	823 Themis	Bakery
Arthur A. Vogel	321 N. Pacific	Bakery
Melvin Rodibaugh	825 Merriwether	Lumber

[fol. 245] August 10, 1940

Honorable Hinkle Statler, Mayor
Cape Girardeau, Missouri

Dear Mayor: REF: New Federal Building

As early as June 21, 1940, in reply to a letter from Washington, D.C., I stated my position regarding the matter of site for new Federal building as follows:

"I hasten to advise (1) that I have been interested only in obtaining for Cape Girardeau an adequate Federal Building, and (2) that it be made a memorial to Julien Friant."

Recently I tried to make my position clear to Mr. M. J. Deutsch, Federal Agent who came to my office for the purpose of discussing a number of propositions which had been submitted for consideration. I stated that I was interested only in the selection of a site as soon as possible in order that the government might commence construction of a new Federal building without delay, and emphasized my position, namely, that in my opinion it would be unwise for close personal friends of the late Julien Friant to enter into any controversy regarding the merits of any particular site, and that Julien's friends should, without question, agree in advance to favor whatever site the government might select. However, as you are already aware, I deemed it both necessary and proper to state my position regarding two of the sites under consideration, (1) the so-called Christian Church site, and (2) the Courthouse park site, for the reasons hereinafter set out.

Christian Church Site

That the writer is a member of the Christian Church Board, and in that capacity is more or less familiar with the situation. In my opinion, nothing of value would be accomplished by a consideration of the Christian Church property as a site for the new Postoffice building. At the same time, a discussion of the matter would be unfair to the congregation and embarrassing to the writer because of the writer's efforts to get the Postoffice Department to construct without delay an adequate Federal building for Cape Girardeau and that it be made a memorial to the late Julien Friant.

[fol. 246] That the question of submitting the Christian Church property as a suitable site for the Postoffice building was never considered by either the Trustees or the Official Board of the Church.

That it is obviously to the best interests of the congregation (the only authority that has any right to pass on the matter) to avoid an unnecessary controversy regarding the sale of the church property to the government.

Courthouse Park Site

That the writer, without raising any question as to the legal right of the Mayor to dispose of city property as proposed, called attention to the following obstacles:

(a) That the government, upon investigation, might decide that the Mayor and Commissioners do not have the legal right to dispose of the Courthouse park and City Hall and Common Pleas Court Building.

(b) That the Mayor and Commissioners might experience many difficulties in finding the necessary moneys to build streets, driveways and parking space satisfactory to meet the requirements of the government.

(c) That the Mayor and Commissioners might find it extremely difficult to arbitrarily arrange for a temporary City Hall, temporary offices for the Common Pleas Court and a temporary court room for the court pending the construction of a new Federal building.

(d) That the Mayor and Commissioners would be confronted with a serious problem in obtaining necessary funds to pay the costs of remodeling the Postoffice building.

(e) That the City of Cape Girardeau might experience some difficulty in reaching a satisfactory agreement with Cape Girardeau County regarding the transfer of the Common Pleas Court from Courthouse park to new quarters.

It occurs to the writer that it is fair to assume that the foregoing suggestions are not entirely void of merit. At the same time, for the purposes of this letter, I desire to emphasize the fact that I do not question your right to do

any of the things above mentioned, and, so far as I am advised, the Mayor and Commissioners may have plans [fol. 247] for selling the property and financing all of the requirements of the city in connection with the transfer without a vote of the people and without consulting the County Court.

In addition to the foregoing considerations, I am certain that you will find that there are many Cape Girardeau citizens who feel as I do regarding the matter of parks, namely, that Cape Girardeau should have more parks than it has today, and that under no circumstances should the city dispose of any of its present parks or any part thereof without a vote of the people.

As Mayor of Cape Girardeau you are in a position to bring about harmony on the question of selecting a suitable site for the Postoffice building by declaring that, as Mayor, you will aggressively favor any site that the government may, in its wisdom, select. I am strongly of the opinion that every citizen of Cape Girardeau is vitally interested in getting work started on the new Postoffice building as speedily as possible.

I confidently appeal to you to join with other citizens of Cape Girardeau in signing a statement addressed to the Federal Works Agency for the information of said agency, the Postoffice Department, Justice Department and Treasury Department, reciting, among other things, that the signers of said communication pledge themselves to favor whatever site the government, in its wisdom, might select for a new Federal building, and urging the government to speedily select a suitable site and to commence the construction of a new Federal building without delay.

Sincerely yours,

I. R. KELSO

Filed November 29, 1943, Jas. J. O'Connor, Clerk
Filed December 13, 1943, Jas. J. O'Connor, Clerk.

[fol. 248] Mr. Cooper: That page, while it says "Broadway", it really fronts on Fountain, doesn't it Judge Bowman?

Mr. Bowman: Yes, sir; we can agree on that.

Mr. Cooper: Your Honor, while they rest, we would like to offer the balance of that report which includes this letter to Mr. Deutsch from Judge I. R. Kelso, together with the list of people in Cape Girardeau who are ready and willing to cooperate with the Government.

Mr. Kelso: Your Honor please, if they want to offer anything I think it would be better for the record to wait until their time to offer testimony.

The Court: Very well.

Mr. Cooper: It was part of Mr. Deutsch's report.

The Court: They are objecting to it being put in at this time.

Mr. Cooper: I will be glad to offer it later. There is also a recommendation of the Joint Committee on the foot of this Deutsch report, which was not read. We would like to complete that by reading it or have the right to offer it a little later.

The Court: I thought they offered the entire report, and parts of it I suggested they not read.

Mr. Blanton: This is on the bottom of page 8, recommendation of the Joint Committee on Public Buildings, Suit No. 1-B, property offered by the City of Cape Girar-[fol. 249] deau, 208 by 240 price exchange by present owner Federal property as per proposal 11/20/40 of recommendation acquisition of the above property by acceptance, and signed by Walter Meyer, L. A. Simon, Supervising Architect, and Edward R. Witman, Joint Committee on Public Buildings.

Mr. Kelso: The only suggestion that we have, if they want to do it now, is that we did offer the full report made by Deutsch, but this that they are talking about is something endorsed on his report by somebody else. It is no part or parcel of his report.

The Court: It is part of that exhibit.

Mr. Kelso: It is part of the exhibit, but he says it is part of the Deutsch report, and I want to distinguish between the Deutsch report and that recommendation.

The Court: I understand that, but this is part of the exhibit that you have offered.

Mr. Kelso: That is right.

Mr. Kelso: Now I am going to read from the depositions that have been identified as Carmack's Exhibit E, but which is marked in this case "Defendant's Exhibit C". I am reading from Defendant Carmack's Exhibit C, which is the depositions taken in Washington City and which have been already read from and offered in evidence, certain parts of it, by the plaintiff this morning.

The Court: Witman's deposition?

[fol. 250] Mr. Kelso: He read Mr. Witman's deposition. I am going to commence at page 15.

Mr. Blanton: We want to object to this preliminary conversation. The first 52 pages of this document is nothing but a conference and a lot of questions and answers which Judge Kelso keeps reading, that are not pleaded in his answer. It doesn't purport to be testimony.

Mr. Cooper: It is just talking between the attorneys.

The Court: Maybe he isn't going to offer that. Where are you commencing?

Mr. Kelso: I am commencing at page 15, line 12, to page 54, line 8, under stipulation that expressly provides that if these gentlemen desire to make any objection at all, they should do it and notify me of it ten days before court convened. And I think that is taken care of in the stipulation. And I am not going to read any from the answer.

Mr. Blanton: Object to any part of the document that he is talking about reading.

The Court: You are starting to read from deposition of E. R. Witman, page 15? Is that what you have?

Mr. Kelso: That is what I have.

Mr. Blanton: Unfortunately, the deposition does not begin until page 53.

The Court: I cannot tell. There seems to be a dispute about where it commences.

[fol. 251] Mr. Kelso: Defendant Carmack desires to offer in evidence the record as made and certified to as the deposition taken at that place, and there were many stipulations made, and the approach to it is as much a part of the picture as the deposition of the witness, because I was there from the 26th of October to the 24th of November getting this deposition and this stipulation.

Mr. Blanton: The stipulation has already been read by him this morning.

Mr. Kelso: We arrived at that, all these things here. It was said then if they had any objection to this, they would notify us before the 10th. That is in the stipulation.

The Court: Are you offering the whole deposition of the witness?

Mr. Kelso: No, sir; I am commencing here on page 15, at line 12.

The Court: I suggest you state what parts you are offering and then the Court can read that without the necessity of your reading it at this time.

Mr. Blanton: I don't know what he calls getting ready to offer. This document which he has produced —

The Court: Let's all remain quiet until he gets through making his offering. He stated where he will commence. Now we want to find out where he is going to end.

Mr. Kelso: Commencing on page 15, at line 12. I am [fol. 252] going to offer in evidence without reading, if the Court please, pages 1, 2 —

The Court: Just a moment, you stated a moment ago you were going to offer commencing at page 15. Do you withdraw that?

Mr. Kelso: Yes, sir; I am not going to read this. I am commencing on page 1 but not going to read any. And then I am going to offer pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14; and then again commencing on what is marked here page 1 of the transcript. The other contains

stipulation of things that were offered. Then it will take 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20. Now commencing there on page 10 that I just mentioned, I will omit — I mean page 19 where it commences with the first paragraph of the answer. Then all of page 19 is omitted, all of page 20 is omitted, all of page 21, page 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43. And then I will commence again on page 44 at line 8 and continued page 44, 45, 46 and 47. And then I will continue the rest of the deposition, Your Honor, to the end.

The Court: Page 44 to the end?

Mr. Kelso: Page 44, line 8, to the end, and reserving the right, of course, in offering this in evidence and not reading it, that if at any time I want to quote from the deposition, it is proper to do so.

[fol. 253] Mr. Blanton: To which we object for the reason the document which he has shows on its face it does not purport to be a deposition. It is nothing but a conversation or self-serving statements made by Judge Kelso and some men with whom he was in conversation in Washington, and the deposition does not begin on the document until page 53.

The Court: Overruled at this time.

Mr. Blanton: Note our exception.

Mr. Cooper: We would like to add to that objection, it simply encumbers the record for no purpose.

The Court: Objection overruled.

Mr. Cooper: Note exception.

(Defendants Exhibit C is in the Court Files)

Mr. Kelso: Having omitted all of those pages, it is proper to state that when I refer to Mr. McLeod, that he was one of the attorneys who appeared and entered his appearance as one of the attorneys for the plaintiff in this case at the taking of the depositions.

Mr. Blanton: Unless Judge Kelso wants to be sworn, we ask that statement be stricken from the record. He was not attorney for the plaintiff at all.

The Court: What has that got to do with the case?

Mr. Kelso: All of this we have omitted, that they were talking about, is where starting off on the deposition Mr. McLeod said he was the Assistant Attorney-General of the United States, and that he had been designated to appear [fol. 254] there as one of the attorneys for the plaintiff at the taking of the deposition, and he participated in the taking of the depositions.

The Court: Are you omitting the part where he took part?

Mr. Kelso: Yes, sir; when I say Mr. MacLeod said to me on page 44, "Mr. Kelso, you are asking for these witnesses to have their depositions. Mr. Emmert can tell you about these various witnesses.

"Mr. Emmert: Mr. Wickman is here and now available."

The Court: You have offered the deposition, the parts you want to offer. Now proceed.

Mr. Kelso: Your Honor, I will offer all of the deposition without reading it.

The Court: I thought you had offered the parts you wanted to offer.

Mr. Kelso: Yes, sir; that is right.

The Court: Very well, they have been received, and when I get down to passing on the case I will read them.

Mr. Kelso: I am not reading that. This commences at another place entirely. I want to refer to it for this reason: "Mr. Emmert:" I was calling for John N. Edy, attorney for the plaintiff.

Mr. Cooper: Does that deposition show he was attorney for the plaintiff?

[fol. 255] Mr. Kelso: The record shows he entered his appearance.

Mr. Cooper: For the plaintiff?

Mr. Kelso: Yes, sir.

A Party Present: Mr. Emmert was present with the other attorneys there. You were asking and we were getting at the information. As Mr. Blanton says, that was conversation between the attorneys in an attempt to try to get in the witnesses that he wanted.

The Court: What took place between you and the attorney about the witnesses, what has that to do?

Mr. Kelso: It has this: We agreed that the number of witnesses that I had listed that I wanted to take, that I couldn't take for the reason I accepted the statement that they knew nothing about it or were not available, and finally after all these other things we put this in the record, that Mr. Emmert, Assistant General Counsel, when he says, "I enter my appearance"—

The Court: I don't see what it has to do with the case, still.

Mr. Kelso: John N. Edy is the man that signed the request for the institution of this proceeding, and I wanted to take his deposition, and I couldn't get that, and we agreed not to take it for the reasons stated later on in these depositions, because we agreed—

Mr. Cooper: If they agreed not to take it, that ought [fol. 256] to close the door on that.

Mr. Kelso: That is simply heckling. What are the facts?

"Mr. Emmert: Mr. Edy is no longer with the Federal Government, but he is the City Manager, I understand, of the City of Houston, Texas." Some of these other gentlemen, we will produce them."

Now I wanted to know about Mr. Tucker that had testified. Mr. Emmert said, "Mr. Tucker is no longer with the Public Works Administration. He is in private business, I understand." Mr. Witman said, "Out in Oklahoma, I hear."

"Mr. Emmert: Out in Oklahoma.

"Mr. Emmert: Mr. Deutsch is also no longer with the Public Buildings Administration."

"Mr. Witman: He was not with us in the first place."

"Mr. Emmert: He was with the Post Office Department, and he is now in the army."

"Mr. Emmert: Mr. H. S. Roome is no longer with the Public Buildings Administration, and I have no address on him. I might be able to get the address, but so far on this short notice I have not traced him. He is retired I understand."

"Mr. Emmert: More specifically Colonel Carey is with the Federal Works Agency, but is out of the country and in Porto Rico."

"Mr. MacLeod: Well, do you have any suggestions as to the time on any of them, and let's see where we can get on this?"

[fol. 257] "Mr. Emmert: I must confess that it is not easy on a matter of this kind to garner together the highest officials of an agency of this kind."

"Mr. MacLeod: Well, now go on down the list and give us your opinion. Mr. Reynolds, can you fix any time for him?

"Mr. Emmert: I wouldn't undertake at this moment to fix time for him or anyone of the others."

The Court: Is it your purpose in referring to these matters to explain why you didn't take certain parties depositions?

Mr. Kelso: Yes, sir; I gave notice to take Tucker and notice to take these, and the agreements come along and show what was done and what was finally agreed to.

A Party Present: We were attempting to get all the Government's witnesses together for Mr. Kelso, and we were telling why we couldn't get some, that men had left in the service, out of the country and in the army. That was the only purpose, in trying to produce witnesses for Mr. Kelso, and we produced all that we could.

The Court: You are attempting to show the Court the reason why certain parties in connection with this matter were not heard?

Mr. Kelso: And heard; Counsel agreed to what they knew and didn't know.

The Court: You mean that was the reason of the stipu-
[fol. 258] lation you have already read and entered into, or have you another stipulation?

Mr. Kelso: We have stipulations in here, and statements.

The Court: As to what the witnesses would testify?

Mr. Kelso: We have a statement to this effect, that Mr. Edy who signed that never sat with the committee. He knew nothing about any of the facts.

The Court: Lets get right down to the meat. If you have some stipulation or statement you want to offer, let's offer it separately and see if there is any objection, and pass on that.

Mr. Kelso: Not having gone through, I can't take the time. I would not want to take it here and go through it. On one page it will be the statement of Mr. Edy, and another page would be Mr. Emmert's statement about Mr. Edy, and then the Counsel who said that General Walker never participated, as is already shown here, and had no knowledge of the facts, and that General Fleming, the Administrator of the Public Works Agency, never sat in on any conference.

The Court: Now give the pages.

Mr. Kelso: I had not selected the pages, but if Your Honor wants me to do that—

The Court: Can't you give the page they start and where they end?

Mr. Kelso: I cannot, Your Honor, because as Coun-
[fol. 259] sel for the Government has well stated, there was so much confusion of the attorneys who were seeking to have conversations backwards and forwards with respect to this matter, that they come in here and there.

The Court: You think it is necessary for you to go through and pick them out?

Mr. Kelso: I would say so.

The Court: Very well, proceed.

"Mr. Kelso: But I hope it will not take too long because of the very difficult hotel situation."

Mr. Cooper: We are objecting to the statements of Counsel which he is purporting to offer, because that was simply a conversation between Counsel.

The Court: I understood Counsel was just explaining what he was going to offer. Proceed and let Counsel have a chance to make an objection to any offer you make.

Mr. Blanton: What page are you reading from?

Mr. Cooper: There is no stipulation, it was all determined in a final stipulation which has already been offered.

The Court: I do not know what counsel is going to offer.

Mr. Cooper: I think I do.

The Court: Well, you may be better versed on what is in the book than I am. Proceed.

Mr. Kelso: Page 48, right where I was, on line 21.

[fol. 260] "Mr. Kelso: Now, Mr. Emmert, to make myself very clear, you did not give me the name of Mr. Eddy's successor."

"Mr. Emmert: The position that Mr. Edy held has been modified in parts insofar as he was executive officer and budget officer. That position is now held by Mr. Ernest E. Hall."

"Mr. Kelso: Well, in the capacity that he acted when he signed the request to file the suit?"

"Mr. Emmert: He acted then as indicated; that day he just happened to be the Acting Administrator that day and signed whatever papers were put on his desk for signature. Mr. Edy, in addition to his other duties acted as Administrator in the absence of the Administrator at that time," Mr. John M. Carmody.

Mr. Kelso: Then down in line 25,—

"Mr. Emmert: As to Major General Philip D. Fleming now—"

Mr. Blanton: What page?

Mr. Kelso: 49, line 25.

"Mr. Kelso: I have asked for the General.

"Mr. Emmert: Do you intend to ask for General Fleming?"

"Mr. Kelso: Yes; you see the General signed this last request to institute this particular suit. It was signed by the General, which makes it incumbent upon me to take his deposition for whatever it might be worth."

"Mr. Witman: Tucker was associate architect in the office of the Supervising Architect of the Public Build- [fol. 261] ings Administration."

"Mr. MacLeod: I think if you are going to ask all these questions—"

"Mr. Emmert: You have asked for these people—

Mr. Blanton: On line 14, page 50, "Mr. MacLeod: "I think if you are going to ask all these questions".

Mr. Kelso: I will read that. I will read it all then.

"Mr. MacLeod: I think if you are going to ask all these questions—"

"Mr. Kelso: I shall try."

"Mr. Emmert: You have asked for these people, and we have told you where they are and when they will be here or will. I will give you that."

"Mr. MacLeod: You have all of that information now. Let's go ahead."

"Mr. Kelso: May I save a little time and grief by giving the gentleman who is going to get this together my view on the situation? I shall start with my witnesses today. I started in with my notice to take depositions with the idea that all that would be required would be to find somebody, directed by General Fleming, who would be in charge, or who had the custody or control of the custodian

at least of Mr. Roome's report, Mr. Tucker's report, and any other reports filed. I do not intend to let Mr. Roome testify as to what was in his report. I do not intend for [fol. 262] Mr. Tucker to change his report in any testimony. But I think that the usual way would be, if available, would be to let Mr. Tucker, if it was insisted on, and he was here, to identify his report. I think I can do it otherwise than to have Mr. Deutsch identify his report. Now Mr. Deutsch is in the army; Mr. Tucker is somewhere else, and Mr. Roome is out here somewhere retired. To get the matter clear, if you say to me thirty minutes from now that they did not do that, what I want is the name of the party who is actually in charge of these reports, who is the custodian."

The Court: The things you are reading do not touch this case top, side nor bottom. It is not testimony, it is simply conversation taken of some Counsel. There may be something in there germane to this case, but you are not reading it now. Certainly you do not claim what you have just finished reading has anything to do with this case?

Mr. Kelso: Well, I am sorry that is the implication Your Honor gets when I read it. I thought, and still with all due respect to the Court, I thought that I was reading something that would eventually be very material.

The Court: What difference does it make whether the witness you are referring to is in the room or some place else, and after the lawyer tells you that he is not going to let a certain witness testify, he is not going to let a wit- [fol. 263] ness testify as to what is in some file. I do not think you ought to take up time with things of that character. I am not saying you may not have some stipulations and things in your record that are material, but these matters manifestly to my mind are clearly outside of the issues in this case.

Mr. Cooper: I will say to Your Honor that I read that carefully from beginning to end twice, and there are no stipulations that I know of there except the stipulation which has been offered to the Court. It is all conversation between attorneys.

The Court: I do not want to preclude Counsel from offering anything that is relevant to the issues in this case, but I think what Counsel has just read is subject to the objection made by Government's attorney.

Mr. Cooper: I may say plainly and candidly that Mr. Kelso did not know the men he wanted, he was on a fishing expedition trying to find some of those fellows, and some had gotten away, they were not there.

The Court: We will not go into that. Proceed, Judge, and see if you cannot get down to the meat of this lawsuit, if you have some other testimony you can put on. It is going to take the balance of the day to take that. Maybe by morning you could have it somewhat as to what is pertinent and what is not.

Mr. Kelso: If you just let me limit this for reading, I [fol. 264] will try to work it out and make it as brief as I can.

The Court: Very well. Have you some more witnesses or evidence of any character you can put in now?

Mr. Kelso: Just a moment, Your Honor.

Ex. C. pp. 1 to 14 will be found on folio pages 362 to 375, incl. Transcript, pages 1 to 20 will be found on folio pages 376 to 395, incl. Transcript, pages 44 to 47 will be found on folio pages 419 to 422, incl.

[fol. 265] Mr. Hall: If the Court please, we offer now in evidence the deposition of Harland Bartholomew, taken at St. Louis, Missouri on December 6, 1943. The deposition was taken pursuant to a stipulation signed by L. L. Bowman and I. R. Kelso as attorneys for the defendant.

The Court: I understand there are no objections to that?

Mr. Blanton: We are trying to find our copy. There is no objection to the competent part of it, if any.

Mr. Hall: I will read the deposition.

"In the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action."

The Court: You are offering all the deposition?

Mr. Hall: All the deposition.

The Court: Can't you just offer it and I can read it?

Mr. Blanton: I don't want to burden the Court; but that does not give us an opportunity to object to the incompetent parts.

The Court: Very well, you can mark the objections on the margin of the deposition.

Mr. Blanton: May we do that over night, Your Honor?

The Court: Very well.

[fol. 266] Stipulation to Take Depositions.

In the United States District Court, Eastern District of Missouri, Southeastern Division.

Civil Action, File No. 482.

United States of America, Plaintiff,

vs.

Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., Defendants.

Condemnation Suit. File No. 482. October Term, 1943.

It is hereby stipulated and agreed by and between the above named plaintiff and Iska W. Carmack, one of the defendants, through their respective attorneys, that the testimony of Harland Bartholomew, a witness on the part of Iska W. Carmack, one of the defendants, in said cause, be taken before Julia Laurent, Notary Public, at the office of Harland Bartholomew and Associates, 317 North 11th Street, Room 919, St. Louis, Missouri, or any other Notary Public in and for the City of St. Louis, State of Missouri, on the 6th day of December, 1943, at the hour of 9:30 A. M., or at such time as may be agreed upon between the attorneys representing the plaintiff and the attorneys representing defendant, Iska W. Carmack, who shall appear at the taking of said depositions, and if not completed on said day, it shall be continued from day to day thereafter until completed.

That the testimony may be written down in shorthand by a shorthand reporter and thereafter transcribed, and the signing of the deposition by the witness is waived, and that said deposition when taken shall be mailed direct to the Clerk of the United States Court Eastern District of Missouri, Southeastern Division, Cape Girardeau, Missouri, by said Notary Public for filing in said above entitled cause, and said deposition when taken may be read in evidence in said above entitled cause on any trial or proceeding therein, and it is further stipulated that all objections, except to the form of the question may be reserved until the time of the trial of said cause.

Dated: St. Louis, Missouri, December 2, 1943.

L. LEE BOWMAN,
H. & H. Building,
Cape Girardeau, Missouri,
and
I. R. KELSO,
1st National Bank Bldg.,
Cape Girardeau, Missouri,
Attorneys for Defendant,
Iska W. Carmack.

HARRY C. BLANTON,
United States Attorney,
Attorney for Plaintiff.

[fol. 267] In the United States District Court, Eastern District of Missouri, Southeastern Division.

Civil Action—File No. 482.

United States of America, Plaintiff,

vs.

Certain Land Statute in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., Defendants.

Condemnation Suit. File No. 482. October Term, 1943.

Deposition of Witness to be used in an action pending in the United States District Court within and for the Southeastern Division of the Eastern Judicial District of Missouri, wherein United States of America, is Plaintiff,

and Certain Land Statute in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., are Defendants, pursuant to Stipulation, under the provisions of Rule 26 of the Rules of Civil Procedure, taken on the 6th day of December, A. D. 1943, at the office of Harland Bartholomew and Associates, #317 North Eleventh Street (Room #919), in the City of St. Louis, State of Missouri, before Julia M. Laurent, a Notary Public within and for the City of St. Louis, State of Missouri.

Appearances:

M. Walker Cooper, Esq., Special Asst. U. S. Attorney, on Behalf of Plaintiff.

Homer Hall, Esq., on Behalf of Defendant Iska W. Carmack.

[fol. 268] HARLAND BARTHOLOMEW, of lawful age, having been first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, deposes and says in reply to oral interrogatories propounded as follows, to-wit:

Direct Examination.

By Mr. Hall:

Q. You may state your name, please?

A. Harland Bartholomew.

Q. Where do you reside?

A. 6228 Westminister Place, St. Louis, Missouri.

Q. And what is the business in which you are engaged, and have been for several years past?

A. Civil Engineering and City Planning.

Q. Do you have offices in the City of St. Louis, Missouri. A. I do.

Q. And where are they located?

A. In the Louderman Building, Eleventh and Locust Streets.

Q. Is it in your office where we are now taking your deposition? A. Yes.

Q. How long have you had your offices at this location in the Louderman Building?

A. Approximately fifteen years.

[fol. 269] Q. And that is at 317 North Eleventh Street in St. Louis? A. That's right.

Q. How long have you been engaged in the business of City Planning? A. Since 1912.

Q. Did you prepare a City Plan for Cape Girardeau, Missouri? A. I did.

Q. And when was that? A. About 1925 and 1926.

Q. Did you have a contract with someone in Cape Girardeau for that work?

A. As I recall, we had a contract with the Chamber of Commerce.

Q. Of Cape Girardeau? A. Yes.

Q. Do you know how the money was raised that paid for the work you did in the preparation of that City Plan?

A. No, I don't recall.

Q. What is the object or the purpose in making a City Plan?

A. The purpose of a City Plan is to anticipate the growth of the city for some future period, say twenty-five or thirty years, to determine the most logical and desirable direction of development of the city as a whole, and to plan or to devise a scheme of main streets, transporta- [fol. 270] tion facilities, park and recreational facilities, zoning, location of public buildings, distribution of density of population and other things that will produce the most economical, efficient and desirable future development of the city.

Q. Did you and your associates in the City Planning work visit the City of Cape Girardeau for the purpose of making a thorough study of local conditions to form the basis of the City Plan which you made for Cape Girardeau?

A. We did. We made quite a number of visits and made various studies, maps and field surveys in order to prepare the City Plan.

Q. In the preparation of a city plan do you, and did you in making the plan for Cape Girardeau, plan for a Civic Center? A. Yes, we did.

Q. And what is the purpose of planning for a Civic Center, and did you make such a plan for Cape Girardeau? I mean the Civic Center?

A. It is very common practice in the preparation of City Plans to design a Civic Center to provide for grouping of public buildings,—first, because it makes possible a more efficient transaction of public business, it is a greater

[fol. 271] convenience to the public to have public buildings together; it is economical, in that frequently where public buildings are located separately a certain amount of extra ground has to be provided in order to give them an adequate setting, and by grouping them together frequently there is at least a much more desirable result in providing a more satisfactory setting if not economy in land acquisition.

Q. In the making of the City Plan for Cape Girardeau in particular was it the purpose or the expectation that that plan in general, or the Civic Center plan in particular, would be carried out immediately? A. No.

Q. That is a matter of growth and development as the city grows?

A. That's right.

Q. And as the people of the city decide on changes that might be important to carry out the plan, is that correct?

A. That's right.

Q. Well, in making the Civic Center Plan for Cape Girardeau did you have in mind those elements you have just described? A. Yes.

Q. You have stated in a general way the type of public [fol. 272] buildings and structures which would properly be included in the City Plan as constructed: can you state more specifically as to describing by name,— for instance, we have here in the City of St. Louis as we look out this window and see the Civil Courts Building, the new United States Government Building, the City Hall, the Municipal Courts Building,— is it the thought of having buildings of that type, and did you have that in mind in your Civic Center Plan for Cape Girardeau? A. Yes.

Q. Have you read what purports to be a copy of the stipulation or agreed statement of facts in the condemnation suit that was brought by the Government in the United States Court at Cape Girardeau for the condemning or acquiring of a site for the new Post Office and Customs House at Cape Girardeau? A. Yes, I have.

Q. And have you read what was represented to you as a copy of a Report of Site Inspection, dated August 20, 1940, made by M. J. Deutsch, Post Office Inspector and Site Agent, relative to a proposed new site for the Post Office and Customs House at Cape Girardeau, Missouri,

and the recommendations of the Joint Committee on Public Buildings made April 7, 1941?

[fol. 273] A. Yes, I have read it.

Q. Will you state, after having taken into consideration all the facts set forth in the stipulation or agreed statement of facts, the report of the Site Agent, M. J. Deutsch, and the information and knowledge that you obtained regarding local conditions at the time you prepared the City Plan for Cape Girardeau, whether in your opinion it is necessary to condemn a portion of the Courthouse Park and tear down the Common Pleas Courthouse, Public Library, and other structures and monuments located thereon, in order to obtain in that location a site for the new Post Office and Federal Court Building?

Mr. Cooper: We have a stipulation in connection with this that the objections may be made at the offering of the deposition, but will the objections be made at this time?

Mr. Hall: Well, if the objection is to the form of the question I think it should be made at this time.

Mr. Cooper: It will not be to the form of the question, Major Hall, and I don't want to let the matter pass by, but personally I prefer to let you go ahead and get his answer and then thresh out the question in Court rather than here.

[fol. 274] Mr. Hall: If the objection is not to the form of the question, as you have just stated it is not, it may be understood that objection to the relevancy and materiality of the testimony may be raised in Court.

Mr. Cooper: Very well.

A. I would not consider it necessary.

By Mr. Hall:

Q. Taking all those facts into consideration that were just mentioned in the preceding question, in your opinion, is it desirable or advisable to take the Courthouse Park, used as it has been for many years, and convert it into a site for a post office building?

A. I would say that it is undesirable and would be rather unfortunate,— most unfortunate.

Q. In your opinion, are there other locations besides the Courthouse Park which are suitable and adaptable for

the location of a post office and customs house in Cape Girardeau, such location of the post office and customs house to be in line with your Civic Center Plan which you made for Cape Girardeau?

A. I think a location on one of the sites suggested in the Civic Center Plan for public buildings would be more desirable and more practicable than a location in the public park.

Q. To be specific, in your opinion, would the property [fol. 275] on the north side of Themis Street lying between Lorimier Street on the east and Fountain Street on the west be a suitable and practical location for the construction of a new post office building?

A. I believe that it would.

Q. And in the plan that you made for Cape Girardeau, and particularly for the Civic Center, did you have in mind the location of various public buildings grouped together on Themis Street?

A. Yes, on either side of Themis Street between Lorimier and Middle Street.

Q. Middle Street is the next street west of Fountain Street? A. That's right.

Q. Your plan contemplated the Civic Center occupying two blocks along Themis Street? A. That's right.

Q. Would the location of the post office at that place on Themis Street have advantages, in your opinion, over the location of the postoffice on this Courthouse Park?

A. Yes.

Q. What do you take into consideration in saying that?

A. I believe that the specific block you mention, or half block, that is, the north side of Themis Street between Lorimier and Fountain, would be a more practicable and [fol. 276] desirable location because of access to the building by trucks, which form an important part of the business of local post offices. In other words, I believe a half block such as the north side of Themis between Lorimier and Fountain would provide, through widening of the east and west alley in that block, a very logical means for access to the building, and at the same time give an appropriate setting for the building and a convenient location for the building as far as access by the public is concerned. Whereas, to locate the building on the public park would cause considerable difficulty in the matter of access

by the trucks which have to have convenient access to a post office building. Either the building would have to be designed for truck access on Lorimier Street, thus placing the rear of the building at the end of Themis Street, which would be unfortunate, or building roadways through the park so that trucks could get in to the building either at one side or in the rear and thus permit facing the main entrance to the building on Lorimier Street. To build roadways in the park would cause considerable disturbance and disruption to the whole park design and be out of harmony with the most logical and desirable development of the park.

Q. In considering the location of post office buildings in [fol. 277] connection with the development of a City Plan, do you take into consideration the fact that the business at a post office is very largely conducted or carried on by trucks coming and going and by the rural mail carriers' automobiles or vehicles coming and going? A. Yes.

Q. And is it common practice and proper practice to take into consideration that means of access and approach to a post office building in determining the location of a post office building?

A. Well, it is more particularly special consideration to so locate post office buildings and municipal building groups to provide for easy and convenient vehicle access for trucks and such.

Q. And in designing that convenient access you also aim, do you not, to remove from contact with the general public traffic the traffic by trucks to and from the post office?

A. That's right, separation of access by pedestrian traffic to the main entrance from convenient access by vehicle on what might be termed a side street or off street facility, away from the main entrance.

Q. From your observation and the information you obtained in connection with the Plan for Cape Girardeau, [fol. 278] is there a driveway capable of being located to the rear of the building that would be located on Themis Street between Lorimier Street and Fountain Street?

A. Yes.

Q. You stated in answer to one of the earlier questions I asked that you have been engaged in the work of City Planning for a number of years: I would like for you to

state, Mr. Bartholomew, where you have done this work of City Planning? I know it is in a great many places but if you will just name some of the more important ones I would like to have it in the record so the Court may know of your experience in this line of work?

A. Our office has undertaken, either the preparation of civic plans or special phases of city planning, such as zoning plans or main thoroughfare plans, in something over 60 American cities and three (3) Canadian cities, including Washington, Pittsburgh, Rochester, N. Y., Louisville, Memphis, New Orleans, St. Louis, Minneapolis, Los Angeles, Portland, Ore., Vancouver, British Columbia, and many smaller cities.

Q. And during the time those civic planning operations were carried on you were the head of the organization that carried on those investigations and made those plans, were you?

[fol. 279] A. I have been in responsible charge of the work, yes.

Q. And your organization could be so designated as known as Harland Bartholomew and Associates, City Planners and Architects?

A. The firm name is correct, — Civil Engineers, City Planners and Landscape Architects.

Mr. Hall: You may examine, Mr. Cooper.

Cross-Examination.

By Mr. Cooper:

Q. As I understand you, the plan you made for Cape Girardeau was along Themis Street from Lorimier Street west past Fountain Street to Middle Street?

A. That's right.

Q. Did you contemplate a widening of Themis Street? Explain just how you were to handle Themis Street?

A. The plan which was shown in our report contemplated a widening of Themis Street with the placement of buildings on either side of the widened Themis Street between Lorimier and Middle.

Q. It contemplated a parkway,— I don't know whether that is what you call it, but I will use that?

A. That's right.

Q. In the middle of Themis Street, didn't it?

[fol. 280] A. That plan showed a suggested parkway in the middle of the street.

Q. What is the width of that suggested parkway in the middle of Themis Street?

A. Well, as near as I can judge from the reproduction of the drawing which is shown by photostat in the report, it is approximately 100 feet.

Q. Now, by parkway there you mean to have grass and shrubbery and trees, do you, and not a place to park vehicles?

A. That's right.

Q. On either side of that parkway your plan called for two roadways, is that right?

A. That's right. This particular plan showed two roadways, one at either side of the parkway.

Q. Was one of those roadways planned for eastbound traffic and the other for westbound traffic?

A. That's right.

Q. And what is the width of each of those roadways as planned?

A. About 27 feet. 26 feet I believe would be more correct,—26 or 27 feet.

Q. Now, the parkway we mentioned a while ago would cover all of the present Themis Street, wouldn't it?

[fol. 281] A. Yes.

Q. And the other streets would come off the blocks on either side?

A. That's right.

Q. In fact, present Themis Street is only 56 feet in width, isn't it?

A. I believe so.

Q. From property line to property line?

A. I don't recall the exact width.

Q. The parkway would take approximately 22 feet off of the property on either side of Themis Street?

A. Yes.

Q. And then the roadways would take an additional 26 or 27 feet off the property on either side of Themis Street?

A. That's right, according to this particular design.

Q. Now, does your report show the size of the block bounded on the north by Broadway, on the east by Lorimier, on the south by Themis and on the west by Fountain?

A. No, it does not.

Q. I believe if I understood you correctly, you mentioned there was an alley running east and west through this block?

A. There is an alley shown in this drawing, and as I [fol. 282] recall, that is the alley that exists in that block, but I don't recall now.

Q. Do you recall the width of that alley, if there is an alley there? A. No, I do not.

Mr. Hall: Pardon me for interrupting, Mr. Cooper, you say that alley runs through the block east and west?

Mr. Cooper: I may be wrong.

The Witness: The block runs east and west the same as Broadway and Themis Street.

By Mr. Cooper:

Q. Now, if the new Post Office and Federal Court Building were erected, as I understand you to suggest, on the north half of that block facing on Themis Street, would you suggest that it be placed midway between Lorimier and Fountain Street, or that it be placed at one end or the other of that block,—the east or west end?

A. I think it would be desirable to place it in the center of the block and take the entire frontage between Lorimier and Fountain.

Mr. Hall: Pardon me just a moment again, Mr. Cooper. Did you say a building facing the north?

Mr. Cooper: The north side of Themis Street but [fol. 283] facing Themis Street,—facing south is what I should say.

Mr. Hall: I thought you had the building facing north.

By Mr. Cooper:

Q. And what is the distance there from Lorimier to Fountain Street?

A. Well, as near as I can scale it from this drawing it is about 365 feet. I don't mean to imply that it is necessary to take the whole block. My thought was that if placed in that block it would have a much more desirable setting if the entire half block were taken. It could be squeezed on to a smaller portion of the frontage of that street.

Q. Now, if the lot for the new Post Office and Federal Court Building in Cape Girardeau did extend from Lorimier to Fountain Street, a distance of approximately 365 feet, what depth should it have from north to south to conform to that length along Themis Street, Mr. Bartholomew?

A. Well, I wouldn't attempt to say because I haven't gone into the matter of the requirements of the building, but it is apparent that if that half block were to be used for the post office building, the particular design here shown in the Civic Center Plan probably should be modified as far as the width of the central park strip is con-
[fol. 284] cerned so that the block in question could be given somewhat more depth than is shown on this particular plan. In other words, this particular scheme was not designed for special buildings. It was merely suggestive in character and was not a detail design for the accommodation of any specific buildings.

Q. I will put it another way, Mr. Bartholomew: if the north half of that particular block we have been discussing, —I mean the south half of that particular block on the north side of Themis Street, were used for a building of this kind and character, it would require moving the whole of Themis Street, south, would it not, in order to add enough room for a site for this building?

A. No, I don't think so. I think that all that would be involved would be less width for the central park strip shown in this particular drawing. For instance, where this central park strip is shown to be approximately 100 feet wide, it would be possible to make a desirable public building group on Themis Street in those two blocks by reducing the central park strip to say 40 feet, and thus increasing the depth of the lots on the four blocks facing it to a greater depth than is shown in this particular scheme.

Q. As a landscape architect would you say that if the
[fol. 285] central park space were reduced to 40 feet the street space on either side should be increased?

A. No, I would still have two roadways on either

Mr. Hall: One roadway on either side?

A. Yes, of the park strip, each roadway to accommodate three lines of vehicles, being 26 or 27 feet in width.

Mr. Cooper: Now, this alley that you would use—?

The Witness: Pardon me, may I add further?

Mr. Cooper: Yes, go ahead.

A. (Continuing) In view of the circumstances produced by a particular building such as the one here discussed, I would also give consideration to the use of a single roadway with a wide strip on either side of that roadway as an alternate.

Q. Now, what width would you suggest for this alley running through the block between Themis and Broadway, Lorimier and Fountain from east to west which would accommodate the truck and automobile traffic to the post office building?

A. I would want to know something about the volume of traffic to be accommodated. I have no information about that, and I would wish to make a particular study of that before determining the alley width.

Q. At the time you made your plan you made no study [fol. 286] of the amount of traffic to the then post office building? A. No.

Q. Do you know now how much of the southwest corner of Broadway and Lorimier Street is covered by the Missourian Building,—what is commonly called the new Missourian Building in that block?

A. No, I don't know.

Q. You can't tell us how far the Missourian Building extends along Broadway nor along Lorimier either, I guess?

A. No, I am sorry, but I cannot.

Q. Do you know if there is only one piece of property between the Missourian Building and the present post office and the Courthouse building at Cape Girardeau facing on Broadway?

A. Yes, I believe that is true.

Q. That is the Bremmerman home, isn't it?

A. Yes, I believe that is correct, as I recall from reading the Deutsch Report.

Q. Do you know how far the present Federal Building, together with the small lawn in front of it, between it and Broadway, extends along Fountain Street?

A. The depth of the present Federal property, as I recall, is around 165 feet. My recollection is again from reading the Deutsch Report. As I remember, it is 165 feet, [fol. 287] or thereabouts.

Q. Now, assuming there was $30,000.00 of the appropriation for the new Post Office and Federal Court Building in Cape Girardeau allocated for the site, from reading the Deutsch Report would you say that the south half of this block could be acquired for that sum of money, Mr. Bartholomew?

A. I don't recall the figures in the Deutsch Report. I have it here and could look it up.

Q. Then you have made no study of the possibility of acquiring that half block for the amount that was allocated for the site for this building, have you?

A. No, I have made no detail study of this as to cost of site.

Q. Now, if the new Post Office and Federal Court Building at Cape Girardeau were located on the north side of Themis Street on the south half of the block between Lorimier and Fountain Street, then what building would you suggest for the east end of this Civic Center where the present Court of Common Pleas Building is situated, or near there?

A. You mean in the park?

Q. Yes, sir.

A. Oh, I assume that that present court building may [fol. 288] stand perhaps for some years yet, but I would suggest that eventually it be removed entirely and that the park be free of buildings, both of the Library and of the Court Building.

Q. You made no study or examination of the old Common Pleas Court Building, did you, Mr. Bartholomew?

A. Made no study of it in what respect?

Q. As to its condition,—its probable life?

A. No, I made no special study of it.

Q. You wouldn't know whether it is riddled with termites and in bad condition or not, would you?

A. No, all I can say is that when we made this Plan in 1926 it was considered to be,—at least I considered it to be, from my general knowledge of the situation, a building that was along in years at that time. I don't remember its age.

Q. Did your Plan anticipate the razing of the present Post Office and Federal Court Building in Cape Girardeau, or tearing it down?

A. Not necessarily. We were uncertain as to whether it would be removed or not, and we showed it on this plan as in its present location.

Q. Well, did your Plan contemplate the erection of a new Post Office and Federal Court Building somewhere?

[fol. 289] A. No, we made no specific plans for particular buildings. As I stated before, this plan is a general location plan without an attempt to provide for specific designs of buildings or specific locations. In other words, we suggested that future public buildings could well be grouped along either side of Themis Street between Lorimier and Middle and made a desirable and attractive and logical public building group.

Q. Well, to make that public building group attractive would the buildings necessarily be required to be of similar design?

A. It is usually better when some general uniformity is obtained but that is not an indispensable requisite.

Q. Should they be of similar size?

A. Well, that is a difficult question to answer because by size one could have buildings of very great difference in cubical content and might have approximately the same height and uniform characteristics. For instance, it would be possible, as is done in our Civic Center here in St. Louis, to have a Municipal Auditorium which is a perfectly huge building as far as cubic content goes, yet uniform in height with the other buildings in the group.

Q. Its increase in cubical content is depth back from [fol. 290] Market Street, isn't it?

A. That's right, and in this Civic Center plan here it would be possible to do something of that nature by merely one suggestion,—having the City Hall and Common Pleas Court Building erected on the south side of Themis between Lorimier and Fountain, which could be so designed as to compare favorably in scale with the new Federal Building on the north side of Themis between Lorimier and Fountain, and eventually there may be need for a public Auditorium in Cape Girardeau, and that could be constructed in harmony, as far as height goes, with the other two structures on the south side of Themis Street

between Fountain and Middle Street, but in that case that building might extend all the way back to Independence. In other words, it is a matter of design.

Q. In order to prevent the new Post Office, Courthouse and Customs Building in Cape Girardeau from overshadowing the buildings across the street of sufficient size to take care of the business of the Common Pleas Court and of the city, and the City Hall, it would be necessary for the Post Office, Courthouse and Customs Building to have depth from Themis Street, wouldn't it, just as your Auditorium has depth from Market Street?

[fol. 291] A. Which building,—the new Federal Building?

Q. The new Federal Building, yes, sir.

A. No, I shouldn't think so. I believe that building could be designed to occupy the south half of the block on the north side of Themis Street between Lorimier and Fountain and not be such a tremendous structure as to dominate the landscape or be out of harmony with some future public building construction on that site. I would say it is primarily a question of whether the Federal Government would wish to cooperate with the city and endeavor to work out a satisfactory public group plan as it has done in a number of other cities.

Q. In your opinion, Mr. Bartholomew, would it be advisable for the new Post Office and Federal Court Building,—for the front of it to come right up to Themis Street, or should it be set back from Themis Street as the present building is set back from Broadway?

A. That, together with the matter of width of alley and other things, is all a matter of design which would be dependent upon a study of the conditions to be met. I am unable to give any specific dimensions or specifications.

Q. You are familiar with the fact that the present Federal Building is built to the east line of Fountain Street, [fol. 292] are you not?

A. I don't recall the setting of that building on that lot. I have a picture of it in this report, which does show that it comes fairly close to the east line,—a set of steps which I assume are on the east line of Fountain Street.

Q. Well, is it your opinion that having a building set back as it is from Broadway is more desirable for a public building of that kind and character than having it right flush up with the street as it is with Fountain Street there?

A. It all depends on the kind of a general design and group plan that may be worked out. Normally it is better to have something of a setback, but again, as I say, it would be dependent on the kind of a group plan that might be devised.

Q. Now, in your opinion, what would be the minimum depth for the new Post Office and Federal Building at Cape Girardeau from Themis Street back north?

A. As I stated previously, I have no knowledge of local conditions, and consequently have no opinion in the matter at this time.

Q. Have you ever made any study of post office, custom house and Federal Court buildings to determine the size [fol. 293] and plans for such buildings to make them most useful and most economical?

A. I worked with the Public Buildings Administration and the Post Office Department in a number of instances where public building groups were being considered, and I don't recall any standard dimensions or designs that were insisted upon by the Department, nor by those divisions of the government, and I believe that that could be worked out here if there were a disposition to do so.

Q. Did you meet Mr. H. Arthur Tucker, one of the architects of the Public Works Administration, who called at your offices in connection with the building, Mr. Bartholomew? A. I don't recall.

Q. It is my recollection that his report says he did not see you but saw someone else. That's why I asked you the question. A. I don't recall.

Q. You did have some correspondence with him about the matter, didn't you?

A. I don't recall that either. I may have but I don't recall.

Q. Do you recall any correspondence you had with [fol. 294] Mr. W. E. Reynolds, Commissioner of Public Buildings, Public Buildings Administration, Washington, D. C.?

A. I have a recollection of discussing the Cape Girardeau situation a few years ago with someone,—I don't recall who, and there was I believe some correspondence but I don't recall specifically what it was or with whom.

Q. The reason I asked you, I have what purports to be a copy of a letter to him there. I would like to ask you to

look at that, and if you care to, check your correspondence and see if that is a copy of your letter? If it is, then I would like to have it identified as an exhibit. (Handing witness copy of letter.)

A. Yes, I believe that is a copy of a letter which I wrote.

Mr. Cooper: Now, I will ask the Notary to mark the copy of letter which has been identified by Mr. Bartholomew, dated November 25, 1940, addressed to Mr. W. E. Reynolds, Commissioner of Public Buildings, Public Buildings Administration, Washington, D. C., FM-Cape Girardeau, Mo., P.O.-CTH, etc. as Government Exhibit No. 1.

Government Exhibit #1 marked for identification.

Mr. Hall: I notice you have marked this letter dated November 25, 1940, Government Exhibit No. 1 [fol. 295] J. M. Laurent, N.P., 12/6/43. There are two copies there as you have handed it to the Notary.

Mr. Cooper: Yes.

Mr. Hall: Do you want them both marked or just the one?

Mr. Cooper: Just the one, the original.

Q. Mr. Bartholomew, would you mind O.K.-ing and initialing that original I just had marked as an exhibit?

A. I would have to look up my file on that to make sure. Let me see if I can find it.

(Whereupon the witness examines his files.)

Q. Mr. Bartholomew, since you have examined your files do you find Government Exhibit #1, being copy of a letter dated November 25, 1940, a true and correct copy?

A. I do.

Q. And you have marked it, "Approved as a true Copy. 12/6/43." with your initials "H. B."? A. I have.

Mr. Cooper: I believe that is all.

Redirect Examination.

By Mr. Hall:

Q. Mr. Bartholomew, in your testimony, and particularly in the cross-examination by Mr. Cooper, you have referred to a report and have made some estimates of dis-

[fol. 296] tances,—for instance, as to the width of parkway down Themis Street and the width of driveways on either side of that parkway. You were referring to your office copy of report that you made to the Chamber of Commerce, or whoever it was at Cape Girardeau that had you make the original City Plan for Cape Girardeau, is that correct? A. That's right.

Q. And you have undertaken to give those distances by scaling on this reduced office copy of the plat, is that correct? A. That's correct.

Q. Now, you stated that according to that Plan which you prepared in 1926 the width outlined for the parkway down the center of the widened Themis Street would be 100 feet, but you also stated that it might be reduced to 40 feet: is it not a fact that in some instances parkways dividing traffic on streets are often much narrower than 40 feet to give the desired effect of dividing the traffic and yet have a parkway down the straightway?

A. I would say that it might be even narrower than 40 feet but that would depend entirely upon the circumstances and the design. I wouldn't say much narrower than 40 [fol. 297] feet. It might be narrower but how much I am unable to say without further study and a particular design.

Q. Now, you have also stated in your direct examination, and have referred in it and in your cross-examination to the Report of Site Inspection made by M. J. Deutsch: You have what was handed to you by me last week as a copy of that Deutsch Report and have read its general provisions and have referred to it in your testimony?

A. Yes.

Q. That is the report, is it? A. Yes.

Mr. Hall: Now, I would like to have that copy of the Deutsch Report that you have examined and taken into consideration attached to your deposition as Defendant Iska W. Carmack's Exhibit "A" in order that there may be no question about what copy of the Deutsch report you referred to.

Defendant Iska W. Carmack's Exhibit "A" marked by the Notary.

Q. This report of the Site Inspection by M. J. Deutsch, which has been marked Defendant Iska W. Carmack's Ex-

hibit "A" by the Notary, is in just the same form and condition that it was when you received it, is that correct?

A. That is correct, yes.

[fol. 298] Mr. Hall: Defendant Iska W. Carmack Exhibit "A" is now offered in evidence.

Said Deutsch Site Inspection Report last above referred to and identified by the witness is now offered in evidence as Defendant Iska W. Carmack Exhibit "A", and same is attached to and made a part of this deposition.

Q. With reference to the location of post office buildings, it is a fact, is it not, that both of the new post office buildings erected in St. Louis are flush up with Market Street on their front side, the north side, except for the steps leading from the street sidewalk to the entrance of the building?

A. Yes, the steps are at the street line.

Mr. Hall: That is all.

Mr. Cooper: No further questions.

(Pursuant to stipulation attached the signature of the witness is waived.)

(Deposition Closed.)

[fol. 299] Certificate.

State of Missouri
City of St. Louis.—ss.

I, Julia M. Laurent, a Notary Public within and for the City of St. Louis, State of Missouri, duly commissioned, qualified and authorized to administer oaths and to take and certify to depositions, do hereby certify that pursuant to Stipulation, in the civil cause now pending and undetermined in the United States District Court, Eastern District of Missouri, Southeastern Division, entitled United States of America, Plaintiff, vs. Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., Defendants, to be used at the trial of said cause in said Court, I was attended at the offices of Harland Bartholomew and Associates, #919 Louderman Building, #317 North Eleventh Street, by Harland Bartholomew, the witness, and by M. Walker

Cooper, Esq., Attorney for Plaintiff, and Homer Hall, Esq., Attorney for Defendant Iska W. Carmack, on the 6th day of December, A. D. 1943.

The said witness, Harland Bartholomew, being of sound mind, and being by me first carefully examined and duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the cause aforesaid, thereupon [fol. 300] testified as is shown in the foregoing transcript, said testimony being by me reported in shorthand and transcribed into typewriting by me; that the foregoing 32 pages correctly set forth the testimony of the aforementioned witness, Harland Bartholomew, together with the questions propounded by counsel, and remarks and objections of counsel thereto, and is in all respects a full, true, correct and complete transcript of the questions propounded to and the answers given by said witness; that pursuant to Stipulation hereto attached the signature of the witness, Harland Bartholomew, to his said deposition is expressly waived.

I further certify that Defendant Carmack Exhibit "A" used by the witness in testifying is attached to the said answers and deposition of the said beforenamed witness.

I further certify that I am not of counsel or attorney for either of the parties to said suit, nor related to nor interested in any of the parties or their attorneys.

It being impracticable for me to deliver said deposition and the exhibit thereto attached with my own hands into the court for which said deposition was taken, I have retained the same for the purpose of being sealed and directed with my own hand and speedily and safely transmitted to said court for which it was taken, there to remain under my seal until opened.

[fol. 301] Witness my hand and Notarial seal at the City of St. Louis, Missouri, this 8th day of December, A.D. 1943.

(Notary Seal)

JULIA M. LAURENT,
Notary Public within and
for the City of St. Louis,
State of Missouri.

My Commission expires: February 5, 1945.

* * * * * *

[fol. 302] (Exhibit A.)

Exhibit A, Report of Site Inspection by M. J. Deutsch, Post Office Inspector and Site Agent was made a part of the typewritten transcript of record at this place, but same is omitted from the printed record to avoid duplication inasmuch as such Report heretofore appears in this printed record as Defendants Exhibit B at folio 212 of this printed record.

[fol. 341] The Court: Now what next?

Mr. Kelso: We are anxious to get our testimony in orderly fashion and we would like to make a list of the Acts of the Missouri Legislature and documents that can be just by title offered in evidence, which we think should be proper in evidence, instead of taking the whole record and offering them. We would like to have it made in the statement which we haven't at this time because we thought we had them at the office and would be able to present [time] in that way, and we do not have them here.

The Court: I do not know whether the record is complete, the last offering you made. Do I understand you are going to make a list of some Session Acts and offer it?

Mr. Kelso: Yes, sir; it is the creation of the Common Pleas, a creation of the old Court that made the deeds and the creation of the District.

The Court: Let it be understood that you will prepare that and furnish a copy to the District Attorney.

Mr. Kelso: Yes, sir.

The Court: I do not know whether it is necessary to offer them. They may be so considered, and if the District Attorney has any objection he may note it on the copy.

[fol. 342] LOUIS HECHE of lawful age, produced, sworn and examined, testified on behalf of the defendant as follows:

Direct Examination.

By Mr. Kelso:

Q. State your name, please. A. Louis Heche.

Q. Where do you live, Mr. Heche?

A. 704 Belleview.

Q. In Cape Girardeau? A. Yes, sir.

Q. Where are you in business?

A. 107 Main Street.

Q. What kind of business?

A. Ladies' Ready-to-Wear Retail Store.

Q. How long have you been in business down there?

A. Over twenty-five years.

Q. How much real estate do you own on Main Street, business houses?

A. I have several pieces. You mean how many pieces of real estate, or how much money?

Q. No; just the pieces of real estate on Main Street. I don't care what the investment is.

A. I have about ten pieces, eight or ten pieces.

Q. Stores? A. Yes, sir.

[fol. 343] Q. How long is the business street commonly referred to as Main Street, so far as business houses are concerned?

A. Well, there are two long blocks of business houses on the street. I judge there is 300 feet to each block in length, I would say offhanded. I am not definitely sure about that.

Q. Main Street is two blocks so far as business is concerned, extending from Broadway to Independence Street?

A. Yes, sir; from Broadway to Independence Street.

Q. Are you familiar with the character of the property on Main Street from Independence south?

A. On Main Street to Independence, south? the character of that property down there?

Q. Yes, sir.

A. Yes, sir; I know pretty well what it is.

Q. Are you familiar with the character of the property on Main Street, north of Broadway? A. Yes, sir.

Q. And you have had a wide experience in business and in the owning and dealing with real estate?

A. Yes, sir; quite a good deal.

Q. Also know about the price or the trend of development from your experience in business? That is to say, you would know whether there was any opportunity for [fol. 344] Main Street to be extended as a business street, north of Broadway?

A. Yes, sir; I do, I am familiar with that situation if that is what you mean.

Q. Is it all north of Broadway subject constantly to overflows regardless of whether the river gets exceedingly high or not?

A. Well, we have had on several occasions in the twenty-five years, there has been water south of Broadway. Well, it has been —

Q. Excuse me, I am not talking about south of Broadway, but you may go ahead.

A. The water has been even as far as Themis Street on the Main Street. It has been on the street below that, I think in a couple of instances, in twenty-five years, twice.

Q. What does it do with the property between Themis Street and Independence Street?

Mr. Blanton: Your Honor please, I do not want to interrupt the competent testimony, but the site proposed is not down on Main and Broadway, and it is not subject to overflow, and I do not see what the purpose of this interrogation so far is?

The Court: It is probably preliminary. Let's get away from that end of the town.

(Last preceding question was read)

A. Well, about a year ago when the water was up, the [fol. 345] water came about half way on that block, approximately half way between Independence and Themis on Main Street.

Q. Now what is the situation as to the property north of Broadway, on Main Street?

A. North of Broadway on Main? Well, that, I suppose that the further down towards the Shoe factory, that property is probably subject to overflow, but I do not have any interest up there and I am not as familiar with that as I am on the other property below..

Q. Most of it is a high bluff?

A. Well, yes, sir, on the west side of the street it is high bluff right above there.

Q. Do you know the situation with respect to Broadway?

A. Well, Broadway from Main Street up is very high grades.

Q. It isn't subject to any overflow, and after you get on the hill at the court house, it is level ground isn't it?

A. Yes, sir; practically so, yes, sir.

Q. Would you say with your knowledge of business at Cape Girardeau that the trend of the development of business would not be on either north or south Main Street?

A. I would say that it would not be —

Mr. Cooper: Object to that, that is not a matter for the Court to determine in this case, what the trend of busi-
[fol. 346] ness is in the City of Cape Girardeau.

The Court: While that is not an issue, it might bear on some other issue. I will admit it at this time.

A. It is a question of what kind of business you want to locate. There are certain businesses it would be adapted for, but not for my particular business.

Q. Any mercantile business? You are referring to north from Broadway? A. North?

Q. Yes, sir.

A. I hardly think it would be adaptable for any retail establishments, I wouldn't think so; no, sir.

Q. And the same is true on the street, south?

A. Independence Street south.

Q. So as a matter of the future business of the territory, it is really in your judgment and your experience limited to the present two blocks?

A. It is limited with the exception of some garages that are down on the other street.

Q. There has been much said about the Montgomery-Ward property, and the moving of that store from Broadway to Main Street. I will show you a picture which I will have identified as "Defendant's Exhibit D". (The

photo is marked as requested) This Exhibit D is a picture of what property?

A. This is the Montgomery-Ward building, right here [fol. 347] (indicating)

Q. And what does that picture show?

Mr. Blanton: The picture speaks for itself.

Mr. Kelso: All right.

A. The picture shows that there is water on the front of the building.

Q. About how deep?

A. Oh, I would say about six inches of water there, six or seven inches, because the window-base is visible, and it is usually around 8 or 10 inches high. Anywhere from 6 to 8 and over 10 inches high.

Q. Did you see that condition when this picture was taken? A. Yes, sir.

(A photo is marked "Defendants' Exhibit E")

Q. I show you Defendants' Exhibit E and ask you if you know what that picture is?

A. Yes, sir; that is the F. W. Woolworth Building.

Q. Located where?

A. On the corner of Independence and Main Street. That would be the northwest corner, I guess.

Q. Are you familiar with the situation that existed when that picture was taken?

A. Yes, sir; I presume that was taken last year in the flood.

Q. Yes, sir. What does that show with respect to the condition?

[fol. 348] A. Well, it shows there was a boat in the water in front of this building.

Q. Does it show the water in the building?

A. Well, I presume so, but you can't see through the glass.

Mr. Cooper: Object unless he knows.

Mr. Kelso: I am only asking him what he knows.

The Court: Judge Kelso, would you inform the Court your theory on which this evidence is material? I am not saying it isn't material, but it might help the Court some to give me your theory.

Mr. Kelso: The testimony already in and some that will be later offered will reveal this fact, or it is revealed now, that one of the arguments, if you call it that, for the location of the site for the court house at the location described in this amended petition was because that Montgomery Ward moved from Broadway to Main Street and the 5 and 10-cent stores were located on Main Street, and that J. C. Penney was located on Main Street, and that the Main Street group influenced the location or the inclusion in their recommendation the Main Street property. The record shows that the Bank president and members of the Board of Directors of the First National Bank on Main Street organized the business men on Main Street and they used the expression pooling the interests to influence [fol. 349] the location of the site of the new post office on the court house site because it would stabilize and benefit this property only two blocks, or whatever it may be, known as Main Street.

Mr. Blanton: You say the record shows that, Judge?

Mr. Kelso: I say Mr. Deutsche's report emphasizes that and I say that it will show, we will offer in evidence the record, which is already in the other case, of the City Council which shows Mr. J. B. Carpenter of the J. C. Penney Store is chairman, and Mr. Clyde D. Harris—

Mr. Blanton: Object to what the record in the other case may show.

The Court: I want to see what his theory is.

Mr. Kelso: And that Mr. Clyde D. Harris as president of the bank, as president of the eight or ten men on Main Street, which were interested, they met and went before the City Council and prevailed upon the Council to locate the new post office on the court house site. Now it occurred to me that that standing alone in reviewing the record might be detrimental to the case on its merits because one would be influenced to feel that the fact that Montgomery-Ward was there and nothing else appearing, and Penney was there and nothing else appearing, and this is the best way that I know of to show that it is unwise, against the interests of the City of Cape Girardeau, for a group of business men to influence the selection of a

[fol. 350] site, and there would be provoking issue between Broadway people and the Good Hope people when that question was settled, when the court house site was located here. And I think that we went through that then. I was the attorney that helped the Government get this site, and I was a member of the Chamber of Commerce, and the questions that were competent as we figured then from the Government's innovation was the future development, and that this site here would be good for seventy-five years.

Mr. Hall: You mean the present post office site?

Mr. Kelso: Yes, sir, where the present post office site is, for the development, and would accommodate all of the interests. And I think that the question to determine the action of the authorities who selected the site as to their conduct or whether in ignoring these facts they acted arbitrarily or not, is to be determined. And that one of the facts to determine that would be the character of the property to be served [to be served] down there and the future trend of the development. And that would be determined by the character of the buildings and the fact that they were periodically subject to overflow by the Mississippi River and that the Mississippi River comes up into these buildings occasionally, down where we are showing these pictures, and the fact that the record will show that this group was headed by, was comprised of the manager of the Penney Store, the manager of the Montgomery-Ward Store, and of the Bank officers, and the chain [fol. 351] stores, can only be answered by showing the facts as to the actual physical condition of the territory which they are seeking to influence the location in order to perpetuate it, or to help to, to the detriment and to the utter disregard of the entire city, and as I contend, to the Main Street group. Because I think it is just as important. In fact, I think it is probably more important to preserve harmony with the Good Hope people, the Broadway people and the Main Street people than it is for any one of them to win a victory in arbitrarily locating a post office to serve a particular community. Now that is the thing. And I think there is no better man, no fairer man, no more interested man than the witness on the stand, and that he can throw as much light on it as anybody in

Washington or anybody else. He cannot be said to be influenced by politics or any other bias or prejudice in favor or against the proposition as to what it is on the merits. He is just giving the facts. Personally, he might want to see it there, but I do not think he would ever join a group, even though he owns ten stores there, to accomplish that kind of an end, because merchants on Main Street are as much dependent on the people of Cape Girardeau for their livelihood as the people on Broadway or Good Hope. And this location and the destruction of the park and the destruction of the court house and the destruction of the library is to be determined by the service [fol. 352] that is going to be rendered to the community in which it is close to, to the detriment of the others. And I think it is competent to show the facts.

The Court: Of course, at the outset you are faced with the law. The determination of these sites is not a judicial question. The principal issue as I read this opinion now before the Court, is whether or not the authorities in selecting this site acted arbitrarily. Now if we are going to go into the two factions I suppose you will bring up all matters of one faction and they will probably give reasons for the purpose of accomplishing the selection of certain sites, and if the other side brings up members of the other faction with equal honesty who give their version why the other site should be chosen, and in the end that testimony would not be of any value to the Court in determining whether the department that made the selection acted arbitrarily. They might have used bad judgment, but that still would not convict them of being arbitrary.

Mr. Kelso: As well said by Counsel for the plaintiff, you cannot prove all the case at once, but it occurs to me that since this is a judicial question and since that must be determined by the facts upon which they acted, that it is entirely competent for this Court to consider those pictures, but I will not pursue it any further. That states my position.

[fol. 353] The Court: I don't want to prevent you from putting on your case, but I assumed you started out on something that probably had no end.

Mr. Kelso: No, sir, it is on the question of arbitrary conduct in the selection.

The Court: Go ahead.

Mr. Cooper: If the Court please, before he pursues that matter further I would like to make an objection. This testimony he is offering now is an attempt to dispute and impeach testimony heretofore offered in the Deutsch report by him.

The Court: Overruled.

Mr. Cooper: Exception.

(A photo is marked "Defendant's Exhibit F")

By Mr. Kelso:

Q. I show you a photo marked "Defendant's Exhibit F", Mr. Hechel. State to the court what that is.

A. This is the Frisco passenger depot.

Q. A year ago?

A. I presume that was a year ago, yes, sir. It is surrounded by water.

Mr. Cooper: Object to what he presumes. If he has some witness that knows it a year ago we think he should prove it by that witness.

The Court: Overruled.

Q. Can you state if you remember that situation?

[fol. 354] A. Yes, I remember last year in the flood that the Frisco station was surrounded by water, and that is the Frisco station picture and there is water all around it. And I presume it was taken last year.

Q. At any rate, whether last year or year before, it shows the Mississippi River water was up in the Frisco station and out on South Main Street?

A. That is right.

(A photo is marked "Defendant's Exhibit G")

Q. What is that?

A. This is Main Street running north and south, and it shows quite a number of the buildings under water, water right through the Main Street there up to half way or a little over, between Independence Street and Themis Street.

Q. That pictures the same condition from the Mississippi River water? A. Yes, sir.

(A photo is marked "Defendant's Exhibit H")

Q. I show you now an exhibit marked "Defendant's Exhibit H" and ask you to state to the Court what that is?

A. Well, this is another picture on Main Street. No, sir, this picture—Yes, sir, this is Main Street, yes, sir. It shows the Montgomery-Ward Building and the Johnson Cleaning Company, and several other buildings with no [fol. 355] names are attached to it, which I recognize. However I can't place what building this is right here (indicating).

Q. The one right south of Montgomery-Ward on Main Street isn't it?

A. No, sir; this building (indicating).

Q. You will have to determine that for yourself.

A. This is opposite, it looks like J. C. Penney Building, but there is no name out there to tell, but that is what it looks like.

Q. What is this over here?

A. That is the Montgomery-Ward Building, and the next to it is Johnson Cleaning Company.

Q. All on Main Street?

A. All on Main Street, yes, sir.

Q. And it shows what condition?

A. It is in the water, the water was on Main Street.

(A photo is marked "Defendant's Exhibit I")

Q. This is Defendant's Exhibit I, state what it is.

A. This looks like it is on Spanish Street. I recognize the building here, on Independence and Spanish. And these buildings are also under water.

Q. Now Main Street that you have just described, it is just one block from the Mississippi River?

A. Yes, sir.

Q. And all of the buildings, with the exception of one, [fol. 356] probably, are on Main Street in Cape Girardeau, just one block from the river. One you said was on Spanish Street?

A. Yes, sir.

Q. The rest of them are all on Main Street?

A. That is right.

Q. And Spanish Street shown under water is the street that runs north and south immediately east—

A. No, sir; it runs parallel with Main Street.

Q. But it runs north and south and east of the Court House Park?

A. It is east of the Court House Park, yes, sir.

Q. And adjacent to it? A. Yes, sir.

Q. You have been here twenty—

A. Little over 25 years.

Q. Are you able to state how often that situation has occurred during your residence in business?

A. I only have a recollection of twice that the water has been on Main Street, and this last years flood was a good deal worse than the first one, and I think the first one was in 1927. I just can't remember what date, but it has been a number of years ago. And the water didn't extend as far north on Main Street at that time as it did this time, not quite as far.

Q. Do you know from the history of it that this high water that we are talking about now started as early as [fol. 357] 1844, a record of which is still marked?

A. Yes, sir; they used to have a mark down on Water Street indicating that in 1844, showing the high water at that particular time. I just don't remember the date.

Q. Now Mr. Heche, you are familiar, are you, with Main Street, Broadway and Good Hope? Are you able to say whether there is any property located in Cape Girardeau that would be suitably fitted for a post office site for Cape Girardeau?

Mr. Cooper: Object to that for the reason, in the first place the witness has not qualified, and in the second place it is not within his jurisdiction to determine where the post office should be selected. The sole issue is whether or not the action of the Committee was arbitrary.

The Court: I do not think it is material, Judge.

Mr. Kelso: Well.

Q. Now then, with your knowledge of Cape Girardeau and the sites with which you are familiar, which have been offered, are you prepared to say whether there is any reason for destroying the public library on the Court House Park in order to find a location for the new post office?

Mr. Blanton: Your Honor, we object to that as being immaterial to the issues in this case.

Q. When did you first learn from any source that the Public Library Building was included in this condemnation?

[fol. 358] Mr. Blanton: Object to that for the reason it would be immaterial under the issues in this case.

The Court: Overruled.

A. When I first learned that the library is included in condemnation proceedings?

Q. Yes, sir.

A. I never knew that the library was included. I have always been under the impression that if the post office is located where the court house is now that it would not affect the library, that the library would not be affected in any way, it would be left as it is.

Q. In the campaign with which you are familiar, that was made? At the time they were voting on it, that representation was made? A. Yes, sir.

Mr. Blanton: Object to that as being immaterial and of no consequence to the issues submitted in this case.

The Court: Sustained.

Mr. Kelso: You may inquire.

Cross-Examination.

By Mr. Blanton:

Q. Now Mr. Heche, this picture of Montgomery-Ward's Store shows that Montgomery-Ward's Store is now located on Main Street, does it not? A. Yes, sir.

Q. How long has it been located on Main Street?

[fol. 359] A. I would say offhanded at least ten years since they have been down there. I am not so clear about it, but I would say ten years.

Q. Prior thereto they moved from Broadway, over here west of this building site and moved down to Main Street?

A. Yes, sir; I think they came here in 1929 and stayed upon Broadway about five years.

Q. This Frisco depot picture you see, that is the source which the incoming and outgoing mail, received in Cape Girardeau, arrives and is delivered, isn't it?

A. Yes, sir; I think off the trains, the mail.

Q. And that is located down on Main Street just one block west of the corner of Independence and Main?

A. One block west of Independence?

Q. South I mean. A. One block south, yes, sir.

Q. Now this water which these pictures indicate was in that part of the town of Cape Girardeau last year, was the highest flood Cape Girardeau has known, according to known records, wasn't it?

A. I think it was right around about that.

Q. It was some 18 inches higher than the record flood of 1944, was it not?

A. I just can't remember offhanded, but I thought that [fol. 360] they said that in 1944 the water was 44 feet high. That is just hearsay on my part. I am not definitely sure. I didn't look up any official records.

Q. Now I will ask you if any water has ever gotten upon the site where the post office site is being condemned?

A. No, sir.

Q. How much higher than Main Street is this post office site where the Common Pleas Court is now located?

A. Oh, it is very high.

Mr. Blanton: That is all.

The Court: Adjourn court until tomorrow morning at 9:00 o'clock.

Mr. Kelso: May I let the record show the exhibits are offered in evidence?

The Court: Yes, sir.

[fol. 361] (Defendants' Exhibit C,—4/18/44 AP.)

(Filed in U. S. District Court on December 13, 1943.)

Depositions of Witnesses.

In the United States District Court, Eastern District of Missouri, Southeastern Division.

Civil Action, File 482.

United States of America, Plaintiff,
File No. 482 vs.
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., Defendants.

Condemnation Suit, File No. 482, October Term, 1943.

Washington, D. C.
November 1 to 10, 1943.

[fol. 362] Deposition of Witnesses
By Agreement
Between
United States of America, Plaintiff,
and
Iska W. Carmack, One of the Defendants.

To be read in evidence on the trial of the above-entitled cause.

On the Part of

Defendant, Iska W. Carmack.

[fol. 363] Certificate of Shorthand Reporters.

We the Undersigned Howard B. Smith and Joseph M. Hall, Shorthand Reporters of the City of Washington, District of Columbia, in the United States of America, engaged in the business of Shorthand Reporting as Court Reporters, Official Reporters for the Federal Trade Commission, Federal Security Agency, Food and Drug Administration, Senate Agriculture Committee, and others, taking Depositions and other Shorthand reporting business, with offices in Rooms 601-602 Mills Building, Pennsylvania Avenue and Seventeenth Street, Northwest, in said City of Washington, District of Columbia,

Do Hereby Certify that the depositions of witnesses, together with the oral and written stipulations or agreements and documents to be read in evidence on the trial of the above entitled cause on the part of the Defendant, Iska W. Carmack, were taken by agreement of the parties in the above entitled cause, pursuant to annexed Notice to take Depositions, and by said agreements of the parties, in the manner, at the places, and at the times hereinafter set out [fol. 364] in this certificate, to-wit:

First, That B. J. Hasson, one of the attorneys appearing for the United States of America, Plaintiff in the above entitled cause, and I. R. Kelso, the attorney appearing for Iska W. Carmack, one of the Defendants in the above entitled cause and Joseph M. Hall, Shorthand Reporter, with offices in 601-602 Mills Building, Washington, D. C., met by agreement, at the office of Norman Littell, Assistant Attorney General, Land Division Department of Justice, Room 2539, in the City of Washington, District of Columbia, in

the United States, on the First day of November 1943 at Ten o'clock in the forenoon of that day, pursuant to a certain notice To Take Depositions, hereto annexed, in a certain cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, wherein the United States of America is Plaintiff and Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., are Defendants, in Condemnation Suit, File No. 482, October Term, 1943; to be read in evidence on the trial of the above entitled cause on the part of Iska W. Carmack, one of the Defendants in said cause.

At the time of said meeting, in said Department of Justice Room 2539 on said First day of November, 1943 at 10:00 o'clock in the forenoon of that day, to wit:

[fol. 365] Appearances: The Reporter was directed to let the Record show the following appearances at this meeting:

B. J. Hasson, Attorney, Department of Justice, appearing for the United States of America, Plaintiff in the above entitled cause.

I. R. Kelso, attorney, with offices in the First National Bank Building at Cape Girardeau, Missouri, appearing as attorney for Iska W. Carmack, one of the Defendants in the above entitled cause.

At said meeting in said Room 2539 (Department of Justice) on said First day of November, 1943, by agreement between the said attorney appearing for the Plaintiff, in the above entitled cause, and the said attorney appearing for Iska W. Carmack, one of the defendants in the above-entitled cause, the Reporter was directed to let the Record show that, by agreement of the parties, the presence of a Notary Public at the taking of the Depositions, and the taking of Oaths are waived; that the Reporter was at said meeting in said Room 2539 on said First day of November, 1943, at the hour of 10:00 o'clock in the forenoon of that day further instructed to let the Record show that, by agreement of the parties, all formalities as to fixing the places and the hours of taking Depositions from day to day shall be waived. That at said meeting in said Room

2539 on said First day of November, 1943 at the hour of 10:00 o'clock in the forenoon of that day the Reporter [fol. 366] was further directed to let the Record show, that, by the agreement of the parties, conferences of the Attorneys would be held for the purpose of facilitating the taking of Depositions; that the presence of the Reporter at said Conferences was waived; that the said Attorneys desired to arrange the order of the taking of the Testimony to suit the convenience of witnesses and as far as possible to agree on the facts which the Attorney for the Defendant, Iska W. Carmack, one of the defendants in the above entitled cause; desired to offer in evidence on the trial of the above entitled case, on the part of the said Defendant, Iska W. Carmack, one of the defendants in the above entitled cause.

That at said meeting in said Room 2539 on said First day of November, 1943, at 10:00 o'clock in the forenoon of that day; the Reporter was further directed to let the Record show that, by agreement of the parties, the taking of the Depositions was continued until 10:00 o'clock in the forenoon, November 2, 1943, at Room 6324, Federal Works Building (formerly Old Department of the Interior Building) Washington City, District of Columbia, in the United States.

(Whereupon, the taking of the Depositions was adjourned by agreement of the above parties as above set forth, until 10:00 o'clock in the forenoon, November 2, 1943, at Room 6324 at Federal Works Building.)

[fol. 367] Second: That the record of the proceedings had in the taking of the depositions in the above entitled cause by agreements between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause, and the Attorney appearing for Iska W. Carmack, one of the Defendants in the above entitled cause show the places at which depositions were taken and the times of the taking of the depositions, the adjournments from day to day, the filing of stipulations and the identification of exhibits filed and other matters relating to the taking of the said depositions, as hereinafter set out:

(a) That the proceedings had at the first meeting of the parties (B. J. Hasson, of the Department of Justice, ap-

pearing as the Attorney of record for the United States of America, Plaintiff in the above entitled cause, and I. R. Kelso of Cape Girardeau, Missouri, with offices in the First National Bank Building, appearing as attorney for Iska W. Carmack, one of the Defendants in the above entitled cause) held at the office of Norman Littell, Assistant Attorney General, Land Division, Department of Justice, Room 2539, in the City of Washington, District of Columbia, in the United States of America, on the First day of November, 1943, at 10:00 o'clock in the forenoon of that day, pursuant to Notice To Take Depositions, as hereinabove set out in clause number "First:" of this Certificate. [fol. 368] (b) That the proceedings had by agreement between the said attorney appearing for the Plaintiff and the said attorney appearing for Iska W. Carmack, one of the Defendants in the above entitled cause, at Room 6324 Federal Works Building, on November 2, 1943, at the hour of 10:00 o'clock in the forenoon of that day, and at the hour of 2:30 o'clock, in the afternoon of that day, are hereinafter set out in the transcript of the record of said proceedings attached to this certificate, commencing on page 3 and ending on page 72 of said transcript hereto attached and made a part hereof.

(c) That the record of the proceedings had by the agreement of the parties as aforesaid at Room 6324, Federal Works Building, on November 3, 1943, at the hour of two o'clock in the afternoon of that day, as transcribed by the Shorthand Reporter, are hereinafter set out in the transcript of the Record of said proceedings attached to this certificate, commencing on Page 73 and ending on page 114 of said transcript hereto attached and made a part hereof.

(d) That the record of the proceedings had, by the agreement of the parties as aforesaid, at Room 6324, Federal Works Building, on November 9, 1943, at the hour of two o'clock in the afternoon of that day, as transcribed by the Shorthand Reporter are hereinafter set out [fol. 369] in the transcript of the record of said proceedings attached to this certificate, commencing on page 119 and ending on page 151 said transcript hereto attached and made a part hereof.

(e) That the record of the proceedings had by the agreement of the parties as aforesaid at Room 4121 Federal Works Building, (Old Department of Interior) City of Washington, District of Columbia, in the United States of America, on November 10, 1943 at the hour of two o'clock in the afternoon of that day, as transcribed by the Shorthand Reporter, are hereinafter set out in the transcript of the Record of said proceedings attached to this certificate, commencing on page 152 and ending on page 192 of said transcript hereto attached and made a part hereof.

(f) That the Record of the proceedings had, by the agreement of the parties as aforesaid, show the adjournment from day to day, and the continuation from the commencement of the taking of said Depositions on November First, 1943, at the office of Norman Littell, Assistant Attorney General, Land Division, Department of Justice, Room 2539, in the City of Washington, District of Columbia in the United States of America, at ten o'clock in the forenoon of said First day of November, 1943, until the taking of said Depositions was completed on November 10, 1943 between the hours of two o'clock and four-thirty o'clock in the afternoon of that day at Room 4121 Federal Works Building, Washington, D. C., [fol. 370] as transcribed by the Shorthand Reporter (except the proceedings set out under clause numbered "First:" in this Certificate) are hereinafter set out in the transcript of the Record of said proceedings attached to this certificate and made a part hereof.

(g) That the Record of the proceedings had, by the agreement of the parties, as aforesaid, show, in addition to the oral agreements copied into the transcript of the Record hereto attached and made a part hereof, the following stipulations or written agreements and other Documents were offered as a part of the record of the testimony taken and identified by the Reporter as agreements and Documents to be returned with and as a part of the testimony taken in the above entitled cause, to-wit:

"(1) Stipulation between parties regarding the taking of depositions in the matter of selection of the site for the

proposed Post Office and Custom House at Cape Girardeau, Missouri."

Said stipulation was signed by:

ISKA W. CARMACK,
Defendant.
By: I. R. Kelso, Attorney,
Offices in the First National Bank,
Cape Girardeau, Missouri.
and
[fol. 371] UNITED STATES OF
AMERICA, Plaintiff,
By: B. J. Hasson, Attorney.
Department of Justice.

Said stipulation was filed with and initialed by the Reporter on November 2, 1943; and by agreement of the parties the Reporter was directed to spread said stipulation on the Record. The transcript of the record of said stipulation is on pages 3 and 4 of said transcript.

(2) Stipulation between the Plaintiff, United States of America, and Defendant, Iska W. Carmack, regarding an agreed statement of facts to be read in evidence on the part of the Defendant, Iska W. Carmack, in the above entitled cause."

Said agreement was signed on the tenth day of November, A. D., 1943, Washington City, District of Columbia, United States of America, as follows:

UNITED STATES OF
AMERICA, Plaintiff,
By: B. J. Hasson, Attorney,
Department of Justice.

ISKA W. CARMACK,
Defendant,
By: L. Lee Bowman,
Cape Girardeau, Missouri, and

I. R. KELSO, Attorney,
Offices in the First National Bank,
Cape Girardeau, Missouri.

[fol. 372] "The foregoing statements approved by:

"HARRY N. McNERNEY,
Attorney,
"Federal Works Agency."

The original copy of said agreed statement of facts or stipulation signed by the Attorneys for the parties as aforesaid was handed to the Reporter by Mr. Hasson, Attorney for the Plaintiff requesting the Reporter to identify the stipulation in a way to identify it as having been received and filed by the Reporter on November 10, 1943. Said Reporter received and filed original copy of said stipulation on said tenth day of November 1943 and marked it with his initials "H. B. S."

By direction of the Attorneys, signing said Agreed statement of facts, the Reporter has copied said original stipulation in the transcript of the proceedings hereinafter set out and made a part hereof, commencing on page 173 and ending on page 187 of the transcript, and the original copy of said stipulation by direction of the attorneys for the parties as aforesaid is returned with the depositions in the above entitled cause to be used as testimony on the trial of the above entitled cause on the part of Iska W. Carmack, one of the defendants in the above entitled cause.

(3) That the record of the proceedings had, on November 10, 1943, between the hours of two o'clock and four o'clock in the afternoon of that day show the following:

[fol. 373] "It is agreed by and between the attorneys appearing for the United States of America, Plaintiff, in the above entitled cause, and the attorney for the defendant, Iska W. Carmack, that the taking of the depositions in the above entitled cause shall be finally closed, and that the attorneys for the plaintiff, United States of America, will deliver, on the morning of November 11, 1943, to the Shorthand reporter, Howard B. Smith, at 601-602 Mills Building, corner of Pennsylvania Avenue and Seventeenth Street, N. W. Washington, D. C., to be transmitted to the Clerk of the United States District Court, Cape Girardeau,

Missouri, as a part of these depositions, the letter of transmittal and the report of the Post Office Inspector M. J. Deutsch, together with all exhibits, papers, documents and enclosures referred to therein, and also the agreement between The City of Cape Girardeau, Missouri, and the United States of America relating to the exchange and transfer of the Federal Post Office Building and site for the proposed new Federal Building site involved in this proceeding.

[fol. 374] (4) That the Shorthand Reporters have, by agreement of the parties as aforesaid, transcribed the record of all the proceedings had in the taking of the depositions in the above entitled cause; and do hereby further certify that the facts set out in this certificate are true and correct; and that the record of all proceedings had in the taking of the depositions in the above-entitled cause are fully set out in this certificate and the transcript of the proceedings hereinafter set out, attached to, and made a part of this certificate, together with the concluding affidavit and/or certificate of the Shorthand Reporters, and the original agreed statement of facts, and certificate of identification attached thereto and made a part thereof; and that said record; consisting of 237 pages, to wit: (a) initial certificate consisting of 14 pages, numbered 1 to 14; (b) transcript of testimony consisting of 192 pages, numbered 1 to 192; (c) agreed statement of facts consisting of 15 pages, numbered 1 to 15, and 1 page certificate of identification attached thereto; (d) final affidavit and/or certificate of the Shorthand Reporters consisting of 15 pages, numbered and/or lettered A to O; — being the record of the taking of depositions in the above entitled cause to be read in evidence on the trial of the above entitled cause, on the part of Iska W. Carmack, one of the defend-
[fol. 375] ants in the above entitled cause.

HOWARD B. SMITH,
Reporter.

JOSEPH M. HALL,
Reporter.

Subscribed and severally sworn to before me on this 22nd day of November, 1943.

MARGARET C. SCOFIELD,
Notary Public.

(Seal)

My commission expires Aug. 31, 1948.

[fol. 376] Transcript Of Testimony

Of

Witnesses E. R. Witman, J. F. Betterley,

And R. S. Hart

Taken On November 2, November 3, November 9,

And

November 10, 1943.

By Agreement Of Parties

Before

J. M. Hall And Howard B. Smith

Shorthand Reporters

—

The Taking Of Oaths

And

Signing Of Depositions Waived

[fol. 377] The Proceedings Had In The Examination Of Witnesses Were Taken In Shorthand, Transcribed, And Are Hereinafter Set Out.

[fol. 378] November 2, 1943.

By agreement of the parties the taking of the depositions at ten o'clock a. m. November 2, 1943 at room 6324 Federal Works Building, Washington, D. C., was recessed until 2:30 o'clock p. m. of the same day.

Whereupon, in room 6324 Federal Works Building, (formerly Old Department of Interior Building) Washington, D. C., beginning at 2:30 o'clock p. m. the following proceedings were had, to-wit:

By agreement of the parties the following stipulation was filed with the reporter with the direction to spread the same on the record:

In The United States District Court
Eastern District Of Missouri
Southeastern Division

United States of America, Plaintiff,
File No. 482 vs. Condemnation Suit
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al.

October Term, 1943.

Stipulation Between Parties Regarding The Taking Of Depositions In The Matter Of Selection Of The Site For The Proposed Post Office And Custom House At Cape Girardeau, Missouri.

[fol. 379] The parties hereto agree that:

1. The taking of oaths shall be waived as a matter of course, unless either party desires the sworn statement of any particular witness.

2. And all testimony shall be taken stenographically and transcribed, and, the signing of depositions is waived. In addition to objections at the time of taking testimony, any question may be objected to for any reason, other than the form thereof, at the hearing or trial at which the depositions shall be presented, notwithstanding the fact that no objection was made at the taking of the depositions, if notice of such objection is given to the opposing party's attorney at least ten days before such hearing, the ruling on the admissibility or relevancy to be made by the Court.

3. The certificate of the shorthand reporter shall be sworn to before a notary public.

ISKA W. CARMACK
Defendant
By I. R. Kelso, Attorney.
Offices in the First National
Bank, Cape Girardeau, Missouri.

UNITED STATES OF AMERICA
Plaintiff,
By B. J. Hasson, Attorney.
Department of Justice.

[fol. 380] Mr. Mac Leod: Now that the stipulation has been put in the record, I think perhaps this would be an appropriate time to enter some additional appearances.

Mr. Kelso: As the record now stands we have the appearances of [myslef] for the defendant, Iska W. Carmack, and Mr. B. J. Hasson, Department of Justice, for the Plaintiff. Do you want to add some additional appearances at this time?

Mr. Mac Leod: Yes. Add my appearance now for the plaintiff: Robert R. MacLeod, attorney for The Department of Justice.

Mr. Emmert: And now add my appearance: Paul Emmert, Assistant General Counsel, Federal Works Administration, Washington, D. C.

Additional Appearances:

Robert R. MacLeod, Esq., Attorney for the Department of Justice.

Paul Emmert, Esq., Assistant General Counsel, Federal Works Administration.

Mr. Emmert: Mr. Kelso, there is a number of people on this list here that I am informed you wish called as witnesses in this matter. I do not have a definite list, however, of those whom you wish called. Will you, therefore, state on the record the names and title of those parties whom you desire, at this time?

[fol. 381] Mr. Mac Leod: If you will do that, it will enable us to know just what witnesses you want, and it will facilitate the taking of the depositions.

Mr. Kelso: Yes. I shall be glad to do so. The names of the witnesses are, in part, as follows:

We will start out with Mr. Reynolds, and we will arrange for these witnesses in the taking of their depositions, and I can work out the order of their appearance to suit the convenience of all.

First, Hon. W. E. Reynolds, Commissioner of Public Buildings Administration. Shall we discuss that one first?

Mr. Emmert: No. I would like to have the entire list now, if you will.

Mr. Kelso: Hon. H. C. Hunter, Assistant Commissioner of Public Buildings Administration.

Hon. John N. Edy, Acting Commissioner of Public Buildings Administration, or his successor in office.

Mr. Witman: He is "Acting Administrator" rather than "Commissioner."

Mr. Kelso: Thank you.

Mr. Emmert: I do not know just who he is.

Mr. Kelso: He is the man that signed the request to institute condemnation proceedings as Acting Administrator.

Mr. Emmert: I thought you said "Acting Commis- [fol. 382] sioner" of Public Buildings Administration. That is the reason I raised the question.

Mr. Kelso: He is listed in the Public Directory as Acting Director of Public Buildings.

Mr. Emmert: But you are referring to the man who signed the request. That is John N. Edy, who was at that time the Acting Administrator of the Federal Works Agency.

Mr. Kelso: That is what I assume.

Hon. E. R. Witman, the Fiscal Manager, Public Buildings Administration. Is that correct?

Mr. Witman: That is correct.

Mr. Kelso: Miss Leona L. Kempainam, Secretary to the Commissioner.

Mr. Witman: Not to the Commission, to the Administrator. Not to the Commissioner, I mean.

Mr. Emmert: Of Public —

Mr. Kelso: Of what?

Mr. Emmert: Secretary of the Public Works Agency.

Mr. Witman: Did you get that from the Congressional Directory?

Mr. Kelso: Yes. That is the place I got it.

Mr. Witman: We may as well get these titles straight. I will get a copy of the Directory now.

Mr. Kelso: Yes. Let's do that. You can do that more readily that I can. I do not know who the Secretary [fol 383] is.

Mr. Witman: Secretary to the Administrator.

Mr. Emmert: Also, Secretary to the Commissioner?

Mr. Kelso: It is the same person serving in both capacities, both Secretary to the Commissioner and Secretary to the Administrator?

Mr. Witman: Let me look. Yes, that is right.

Mr. Emmert: Now, we have that straight. What is next?

Mr. Kelso: Hon. Baird Snyder, [Addistant] Administrator of the Federal Works Agency. Is that right according to your Directory?

Mr. Witman: That is correct.

Mr. Kelso: Let us check these also.

Hon. E. E. Hall, Executive Officer, Federal Works Agency. Is that right?

Mr. Witman: That is right.

Mr. Kelso: Colonel W. N. Carey, Chief Engineer. Is that correct?

Mr. Witman: That is right.

Mr. Kelso: Hon. George H. Field, Deputy Commissioner of Investigation.

Hon. George H. Butler, Director of Investigation.

Now, as to Mr. Field, I do not know that I want to list him now, but I do the other people. I am bothered here, [fol. 384] as I said a while ago, because this case started back at a time when some of these men who are now in some other agency, were a part of the Federal Works project. And they were in on it for some reason, I do not know just what. I do not want to overlook them and for that reason I had to list them. I may find that I do not

need the testimony of Mr. Field, but if you call on me to list them I am taking the liberty of putting them in here with the understanding that maybe I won't need him.

Mr. Emmert: For the present he is to be listed, however?

Mr. Kelso: Yes.

Mr. Emmert: What is his title?

Mr. Kelso: Deputy Commissioner of Works — W. P. A. it is.

Samuel Haber, Director, Division of Research and Statistics.

Mr. Witman: I have not found him yet.

Mr. Emmert: He was in W. P. A.

Mr. Witman: Director, Division of Research.

Mr. Emmert: It is Haber. Let us correct that here. Apparently the stenographer got it as "v" and it should have been "h."

Mr. Kelso: George Howe, Supervising Architect.

Mr. Witman: Public Buildings Administration.

[fol. 385] Mr. Emmert: George Howe, Supervising Architect, Public Buildings Administration. All right?

Mr. Witman: That is right.

Mr. Kelso: Murray M. Davis, Supervising Engineer. C. J. Guthridge, Chief of Planning and Space Control.

Mr. Witman: Public Buildings Administration for both Guthridge and also Davis.

Mr. Emmert: Both?

Mr. Witman: Yes.

Mr. Emmert: What was that again?

Mr. Witman: Public Buildings Administration.

Mr. Emmert: For Davis. And Guthridge is the same thing?

Mr. Witman: Public Buildings Administration, that is right.

Mr. Emmert: Do you have the notice here?

Mr. Kelso: Yes.

Mr. Mac Leod: Let me see it first.

Mr. Kelso: I am not through yet calling off the names.

Mr. Mac Leod: Proceed.

Mr. Kelso: I want the Postmaster General for one.

Mr. Mac Leod: I may—I just wanted to see that list [fol. 386] there. Is that all on the list?

Mr. Kelso: I think so.

Mr. Mac Leod: That is all that was on the list, then.

Mr. Kelso: H. A. Tucker.

Mr. Mac Leod: Is that name H. H. or H. A.? I will check that. It is H. Arthur Tucker.

Mr. Witman: H. A. Tucker.

Mr. Kelso: M. J. Deutsch, Site Investigator, is the way they described him. Is that, Mr. Witman, the correct designation of Mr. Deutsch?

Mr. Witman: Site Agent Inspector.

Mr. Kelso: And Mr. H. A. Tucker is what?

Mr. Witman: Assistant Architect.

Mr. Kelso: Of what.

Mr. Witman: Public Administration.—Public Buildings Administration.

Mr. Kelso: I see.

Mr. H. S. Roome, who called himself Liaison Officer—of what?

Mr. Witman: Public Buildings Administration.

Mr. Kelso: Now, gentlemen, it is obvious that I may not need to take some of these names that I have been asked to give at this particular time, and likewise it may

appear necessary for me to give additional names as it [fol. 387] may develop from witnesses during the examination that I may have to call some other witness. I may have gotten the wrong witness. You [understant] that, gentlemen, for instance, that I may call a witness and he may state this his successor is the one I want.

I think of the example, for instance, of Mr. Edy, Secretary, by way of illustration.

But, those are the gentlemen, so far as I know now. But, I might ask Mr. Reynolds, or some one else, say, the custodian of the records, or anyone else familiar with the facts, as to who made the investigation as Site Investigator, or Site Agents, besides Mr. Deutsch.

However, if I discover that there were other men than those named, that being so, then I might naturally want to interrogate these gentlemen. I do not know that there are any, but it might develop that that would be the case, who are very necessary. For the reason just stated, I would not want to close my case and then be confronted with a statement of the United States Attorney that there were four or five other Site Agents who did make reports that I did not inquire into. Or, I might find that there are other [report], or other men. But, if these are not that is one thing, if there are, then I want to develop the facts.

I think that that is about all that I can give you at this time.

[fol. 388] Mr. Emmert: I now know we have a stipulation as to the taking of depositions at this time. But I want to have the record show the object of taking the depositions of all of these men that you have named, excepting Mr. Tucker, Mr. Deutsch, and Mr. Roome, for the reason that they are not named in the notice to take the depositions, and not included in any class that are named to appear, and, therefore, we object to them appearing, and to any endeavor to take the deposition of anyone in the W.P.A., that is not named at all in the depositions. I think we should have some information as to that.

Mr. Kelso: I do not wish to take the depositions of any one who is not within the scope of the notice. I feel that they are very definitely within it. I believe if you can tell

us when these men are available, and when we may get them, we can proceed readily.

Mr. Emmert: I take it, in view of the explanation that has been made now, that you do not desire these people now?

Mr. Mac Leod: Let me explain—

Mr. Kelso: Let me get my position clear. I may make it awkwardly and clumsily, perhaps inartistically, but I would rather make it myself.

Mr. Mac Leod: I just want to know whom you want and do not want, because I would infer from your state-
[fol. 389] ment as Mr. Emmert has just said, that in view of the explanation that has now been made that you do not wish these people?

Mr. Emmert: As to those he stated he wanted, I have no idea that it is at all definite as to when these men are available and when they are not, or as to who is now in Washington and who is not.

Mr. Kelso: If I may continue with my statement to make my position clear, I think it will soon dispel all doubts and questions you may have about the matter, and we can proceed then more readily.

I have tried to make it clear to the Department of Justice what I feel is necessary, namely, to conform as nearly as possible with the decision rendered by the United States Circuit Court of Appeals in this cause, and that, as I interpret it, was that the question of the selection of the site is now a judicial question—you are familiar with it, I am sure—is now a judicial question, I repeat, and I shall have to present to the Court the evidence upon which the Department here, or the Committee, as you may call it, upon which the Treasury Department, or the Post Office Department acted, so that the District Court would be able to say, from the record, that the Department acted properly or improperly with respect to this matter, or that they could be able to show that the Department had sufficient evidence, according to the records, to justify the
[fol. 390] action taken, and that it is in conformity with their views of that action.

Mr. Emmert: I see. May I say just this—

Mr. Mac Leod: First, Mr. Kelso, let me state this: We have your notice, which is broad and indefinite.

What we are trying to do is to find out whose testimony you want to take. This is the testimony, apparently, that you have been calling these witnesses for. We want to know the witnesses that you want called so that we may be able to arrange to have those witnesses testify. That is really what we want to know. We want to know this: Who you want to testify, so we can arrange for their presence. I understand that is the purpose of this matter being taken up at this stage. If I am wrong, tell me so. I understand that is the reason for reading this list just now.

Mr. Kelso: That is correct. That is right. Now, the purpose of reading this list was, at the time it was made and at the time I read it, was to give counsel for this body an opportunity to look over the list and arrange for the taking of depositions to best suit the convenience of the witnesses.

Mr. Mac Leod: Yes. I understand that.

Mr. Kelso: That is the purpose of reading it, and also to advise at this time the names of the witnesses on this list who are not available today, but would be available [fol. 391] at a specific time, a date to be later specified here.

Mr. Mac Leod: That is just what we are trying to do here.

Mr. Kelso: I want the General Counsel here to get the purpose of my stating that I had gone as far as I could, and then I wanted him to know the reason back of my taking it, which is that I want to be able to show to the Court, who now must pass on all of this. For, after all, the question now is a judicial question, and that question has to be determined by what the Committee here acted on.

Mr. Emmert: I am not sure that I am quite clear, Mr. Kelso, on this. I am not familiar with the pleadings. Do I understand that the Judge has raised this question, or that the Circuit Court raised it?

Mr. Kelso: The Circuit Court of Appeals expressly held that it is, now. In fact, to go back a little, during the first trial of this case we contended that we had the right to have produced the Site Investigator's reports, which were in the custody of the United States Attorney, and I had the right to inquire into everything that had been done, because in my answer the defendant, Iska W. Carmack, had alleged facts which, in our judgment, would make it impossible for the Government to take this property, and I insisted that the question was a judicial question.

But, the Trial Court held; without hesitation that the [fol. 392] United States Attorney's contention that it was all secret, and pointed out that the request filed to institute the suit from the Department of Justice to the United States Attorney said "that you will notify the United States Attorney that the Site Investigators' reports are confidential." So the District Court declined to permit defendant, Iska W. Carmack, to offer any testimony or to go into the question at all.

Mr. Emmert: That is all in the previous case is it?

Mr. Mac Leod: Yes. It is a matter of record.

Mr. Kelso: Yes. That is right.

Mr. Mac Leod: In the previous case, not in the matter after the amendment.

Mr. Kelso: Well, now that is all right, but we went to the Circuit Court of Appeals, and the Circuit Court of Appeals held the Trial Court was wrong, that the Trial Court should have permitted us to have gone into all of the facts under the pleadings, so that the Trial Court could have passed on the question of the selection of the site as a judicial question, because in this case we had raised the issues properly, and that it was a judicial question rather than a legislative question. The Circuit Court of Appeals held that the case should have been tried consistent with the views [exprdssed] in its opinion regarding the right of Plaintiff to acquire property devoted to public use by condemnation.

[fol. 393] That is what we are trying to follow.

Mr. Emmert: Then I would understand that you have filed a pleading which raises the question as to the propriety of the selection of this site?

Mr. Kelso: That is right.

Mr. Emmert: Is that the situation?

Mr. Kelso: It is.

Mr. Emmert: What is your contention in that regard?

Mr. Kelso: I have a copy of the pleadings with me that I shall read. I believe that it will save a little time to just read from the answer of Defendant, Iska W. Carmack:

This is entitled:

"In the United States District Court, Eastern District of Missouri, Southeastern Division.

"Answer of Defendant, Iska W. Carmack to Plaintiff's (Second) Amended Petition in Condemnation"

And the style of the case is:

"United States of America, Plaintiff,
File No. 482. versus Civil Action.
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., Defendants.

Condemnation Suit. File No. 482.

October Term, 1943.

[fol. 394] The first paragraph reads as follows:

"Now comes Iska W. Carmack, one of the defendants in the above entitled cause, and, leave of Court having been first obtained, files this, her separate Answer to Plaintiff's (Second) Amended Petition in Condemnation, for herself and others similarly situated, and represents unto the Court, as follows:

"(1) That said defendant, Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in paragraph Eleventh of Plaintiff's said (Second) Amended Petition

in Condemnation, and admits that she claims an interest in the real estate sought to be condemned by plaintiff's (Second) Amended Petition in Condemnation.

"(2) That said defendant, Iska W. Carmack, re-enters her appearance as a defendant or interpleader in the above-entitled cause, for herself and other direct heirs of Louis Lorimier similarly situated.

"(3) That said defendant, Iska W. Carmack, also re-enters her appearance as a defendant or interpleader for herself and others similarly situated, as an inhabitant, citizen, taxpayer, and owner of lots in and near said town (now city) of Cape Girardeau, Missouri.

"(4) That the said defendant, Iska W. Carmack, owns [fol. 395] lots within the town (now city) of Cape Girardeau, Missouri, on which said defendant pays taxes.

"(5) That the inhabitants, citizens, taxpayers, and lot owners in said City of Cape Girardeau, desirous of protecting and safeguarding the public buildings and grounds sought to be condemned, are so numerous that it would be impracticable for all inhabitants, citizens, taxpayers, and lot owners, or a substantial percentage of such inhabitants, citizens, taxpayers, and lot owners who have protested in writing to the City officials of the said City of Cape Girardeau and to the Administrator of the Federal Works Agency of the United States against the condemnation of said property, to be brought into Court as defendants in the above entitled cause; therefore, the said defendant, Iska W. Carmack, files this Answer as a taxpayer and lot owner in said town (now city) of Cape Girardeau, Missouri (as well as in her capacity as a direct heir of said Louis Lorimier) for herself and all lot owners and taxpayers of the said town (now city) of Cape Girardeau, Missouri, similarly situated."

The Court, among other things, said that this defendant, Iska W. Carmack, had the right to raise these issues that we are now raising.

Mr. Emmert: May be I did not make myself clear. Have you raised the issue in this case as to the propriety of [fol. 396] the selection of this site?

Mr. Kelso: I believe the opinion of the Court would be the best way to answer that, and therefore in answer to your question I shall read further from the answer.

Mr. Emmert: Well, I would have in mind merely the part of it that deals with this case, namely, the site.

Mr. Kelso: All right. Here is the situation:

"'For answer to the First paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, admits that she is the owner of, and claims an interest in and to the real estate described in plaintiff's said (Second) Amended Petition in Condemnation; and denies that it is either necessary or lawful for said plaintiff to acquire said property described in plaintiff's said (Second) Amended Petition, by condemnation.''

We further state:

"For answer to the Second paragraph of the plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, admits that the property sought to be condemned in the above entitled cause, is located in the town (now city) of Cape Girardeau, Missouri, in the Southeastern Division of the Eastern Judicial District of Missouri; and specifically denies that said (Second) Amended Petition states facts sufficient to confer jurisdiction upon this Honorable Court to make any pre- [fol. 397] liminary order or orders of any kind authorizing the acquisition of the property described in Plaintiff's said (Second) Amended Petition, by condemnation; that said (Second) Amended Petition in Condemnation is inconsistent with the proceedings required by the Mandate of the United States Circuit Court of Appeals for the Eighth Circuit received, filed, and entered (together with a copy of the Opinion of the said Circuit Court of Appeals in the above entitled cause) in the United States District Court, Eastern District of Missouri, on June 4, 1943, hereinafter referred to for convenience as 'opinion of the Circuit Court of Appeals in the above entitled cause.' "

Mr. Mac Leod: May I ask that you state for the record from what you are reading?

Mr. Kelso: I am reading from a copy of the answer to the (Second) Amended Petition served upon the United States Attorney. Now, this notice to take depositions is—

Mr. Mac Leod: Excuse me for interrupting you now, but I just wanted the record to show that.

Mr. Kelso: I stated that fact when I started out.

Mr. Mac Leod: I didn't—you probably did, but I did not hear you. I am sorry.

Mr. Kelso: Now, to proceed with this matter. It further states:

[fol. 398] "For answer to the Third paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the said plaintiff is authorized to acquire the lands described in plaintiff's said (Second) Amended Petition, by condemnation, and alleges that the request of the Administrator of the Federal Works Agency of the United States to file plaintiff's (Second) Amended Petition as alleged in said paragraph Third, was a wholly arbitrary, improper, and [unathorized] act of the said Administrator of the Federal Works [Jgency] of the United States, and was, and is inconsistent with the said opinion of the Circuit Court of Appeals in the above entitled cause."

It goes on further to say:

"For answer to the Fourth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the said plaintiff is authorized to acquire the property described in plaintiff's said (Second) Amended Petition, by condemnation; and said defendant alleges that the said Administrator of the Federal Works Agency of the United States was, and is without authority to cause said (Second) Amended Petition in Condemnation to be filed in the above entitled cause; that the said Administrator of the Federal Works Agency of the United States, in requesting the Department of Justice to file said (Second) Amended Petition in Condemna-
[fol. 399] tion, acted arbitrarily, improperly, and inconsistent with the said opinion of the Circuit Court of Ap-

peals in the above entitled cause; that under the facts in the above entitled cause and the law governing the procedure in this cause as found and declared by the Circuit Court of Appeals in the above entitled cause, the said Administrator of the Federal Works Agency of the United States was, and is without authority to cause the said (Second) Amended Petition in Condemnation to be filed, as aforesaid, and the Department of Justice was at the time of the filing of the said (Second) Amended Petition in Condemnation, and is now without authority to prosecute the above entitled cause under the opinion of the Circuit Court of Appeals in the above entitled cause."

And it further says:

"For further answer to said Fourth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, states that plaintiff seeks to condemn that portion of the property described in plaintiff's said (Second) Amended Petition, upon which the Public Library building is located; that the condemnation of said land underneath said Public Library building would render that portion of the land covered by the said Public Library building, worthless and unuseable for the purposes mentioned in plaintiff's said (Second) Amended Petition; that the condemnation of the real estate upon which said [fol. 400] Library building is located, would render said Public Library building useless to the public; that under plaintiff's said (Second) Amended Petition; the acquisition of the property upon which said Public Library building is located, would leave said Public Library building without any approach or entrance to said Library building except over the property sought to be acquired by condemnation; that under plaintiff's said (Second) Amended Petition, the said City of Cape Girardeau would, at any time, upon notice from plaintiff, be compelled to tear down and remove said Public Library building from the ground upon which it is now located; that the procedure adopted by plaintiff in its said (Second) Amended Petition in seeking to condemn property not required for use in the proposed project described in said (Second) Amended Petition, is arbitrary, improper, and wholly unauthorized by any law, and is without precedent in the condemnation of real estate for Government projects."

And further:

"For answer to the Fifth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the United States of America, plaintiff herein, is authorized and empowered to acquire by condemnation in this proceeding, the land described in plaintiff's said (Second) Amended Petition, for a public use as a site for the construction and erection of [fol. 401] a United States Post Office and Custom House Building in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri.

"For further answer to said Fifth paragraph of plaintiff's said (Second Amended Petition, this defendant, Iska W. Carmack, states:

"That the property sought to be condemned in this proceeding, is now and has been for many years, devoted to public purposes as herein set out; that there is much available private property reasonably fitted as a site for the construction and erection of a new Post Office and Custom House Building in the said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri; that the said Administrator of the Federal Works Agency of the United States acted arbitrarily and improperly in selecting the public property described in plaintiff's said (Second) Amended Petition, as a suitable location for the construction and erection of a New Post Office and Custom House Building in said City of Cape Girardeau, Missouri; that the filing of plaintiff's said (Second) Amended Petition herein, at the arbitrary and improper request of said Administrator of the Federal Works Agency of the United States, was and is inconsistent with the opinion of the Circuit Court of Appeals in the above entitled cause; that the said Circuit Court of Appeals, in said opinion, found the undisputed facts in the above entitled cause to be as follows:

[fol. 402] "The property (sought to be condemned) is in the nature of a public park upon which is located a court house used by the Court of Common Pleas of Cape Girardeau County, a public library building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being

in front of the library building. The park upon which these structures are located is used for gatherings of the public generally, for band concerts, gatherings of the Boy Scouts, and gatherings of various other groups. It is also used as a place for recreation, and is furnished with setees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but is used for public speakings. The second story of the court house is occupied by the Common Pleas Court, a judge's chambers, and a law library for the court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the clerk of the Court of Common Pleas, the city engineer, the mayor, the city council, and the city attorney. There is a base-[fol. 403] ment in this building used largely for a storage place, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn [illegible] property with the improvements thereon, [illegible] library building.' "

that said opinion of Circuit Court of Appeals in the above entitled cause further requires said plaintiff to allege in plaintiff's said (Second) Amended Petition, that the property described in plaintiff's said (Second) Amended Petition, is the only available property reasonably fitted for the public project, and failure to secure it (the court house and the public park above referred to) by condemnation, would result in the failure or destruction of a public project, namely, the construction and erection of a United States Post Office and Custom House Building in the City of Cape Girardeau, in Cape Girardeau County, Missouri."

Mr. Mac Leod: That is the description of the property that you referred to?

Mr. Kelso: Yes. To proceed further:

"For further answer to said Fifth paragraph of plaintiff's said (Second) Amended Petition, this defendant, Iska W. Carmack, states:

"That there are sites other than the public buildings and park sought to be condemned by plaintiff in its said

[fol. 404] (Second) Amended Petition, available and reasonably fitted for the public project described in plaintiff's said (Second) Amended Petition, namely, a United States Post Office and Custom House Building to be constructed in said City of Cape Girardeau, Missouri."

Now, I am practically following the Circuit Court of Appeals on that.

But to continue:

"For answer to the Sixth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the Administrator of the Federal Works Agency of the United States, selected the real estate described in plaintiff's said (Second) Amended petition as a suitable and proper location for the construction and erection of a new United States Post Office and Custom House Building, pursuant to existing law, as alleged in said paragraph Sixth of plaintiff's said (Second) Amended Petition. That defendant states that the selection of the property sought to be condemned, as aforesaid, was arbitrarily and improperly selected for the following reasons:

(1) That said Administrator of the Federal Works Agency of the United States acted without reasonable and proper regard for the interests of the public within said City of Cape Girardeau, a municipal corporation, one of the political units of the State of Missouri.

[fol. 405] (2) That said Administrator of the Federal Works Agency of the United States also acted arbitrarily and improperly in selecting the Public Property described in plaintiff's said (Second) Amended Petition as a suitable site for the construction and erection of a new Post Office and Custom House Building in said City of Cape Girardeau, Missouri, and his determination to select said property as a suitable site for the construction and erection of a new Post Office and Custom House Building in said City of Cape Girardeau, was made without proper investigation and consideration of the facts, and without reference to the information which an investigation would have disclosed.

(3) That said site described in plaintiff's said (Second) Amended Petition, was arbitrarily and improperly selected

by said Administrator of the Public Works Agency, in support of some sort of an understanding between said Administrator of the Federal Works Agency and the City Officials of the City of Cape Girardeau, not disclosed to the public; that this defendant is informed and believes, and states the fact to be, that the arbitrary and improper selection of said site and the request by the said Administrator of the Federal Works Agency to file plaintiff's said (Second) Amended Petition herein, are pursuant to and a part of said undisclosed illegal arrangement entered into between the said City officials and the said Administrator [fol. 406] of the Federal Works Agency.

(4) That said City officials of the City of Cape Girardeau, had no legal right or authority to sell, trade, convey, or exchange said Public Property described in plaintiff's said (Second) Amended Petition, or to violate the conditions and considerations set out in the deed made by Louis Lorimier (now deceased) to the Commissioners and Assessors, in behalf of and for the use of the District of Cape Girardeau, of four acres, including the land sought to be condemned by the proceedings in this case, said deed being dated July 29, 1807, and recorded in Book B at page 15 of the Land Records of Cape Girardeau County Missouri, copy of which deed is hereto attached and marked Exhibit." And that was attached.

(5) That said opinion of the Circuit Court of Appeals in the above entitled cause, found and declared that,

"The record shows without dispute that the property (property described in said (Second) Amended Petition) has been devoted to public use, not alone because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose."

[fol. 407] "(6). Said City Officials of the City of Cape Girardeau, are legally obligated to maintain the property described in plaintiff's said (Second) Amended Petition, for the designated purposes for which it is now and has been for many years used by the public.

"(7) Said allegations set out in said paragraph Sixth of plaintiff's said (Second) Amended Petition, are inconsistent with the law governing the procedure in this proceeding, as declared in the opinion of the Circuit Court of Appeals in the above entitled cause."

Mr. Emmert: I am, I may say, perfectly willing for whatever you say to go on the record. I only wanted to make clear in my own mind the basis upon which you here were proceeding.

Mr. Kelso: I can think of no better way to present it to you so that you may be fully advised.

To proceed:

"For answer to the Seventh paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the land sought to be condemned herein, has been duly selected by the said Administrator of the Federal Works Agency of the United States, as a new Post Office and Custom House Building site, and states that the action of the said Administrator of the Federal Works Agency in selecting said site, was arbitrary and improper under existing law [fol. 408] as hereinabove set out."

"For answer to the Eighth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, states that she has no knowledge or information as to the accuracy of the blueprint or plat, "Plaintiff's Exhibit A", attached to and filed with the original petition in the above entitled cause with the Clerk of the United States District Court in and for the Southeastern Division of the Eastern Judicial District of Missouri.

"For answer to the ninth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that funds are available to pay any award or awards which may be rendered in this proceeding for the condemnation of said land, as alleged in said paragraph Ninth of plaintiff's said (Second) Amended Petition.

"For answer to the Tenth paragraph of plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, denies that the said plaintiff is authorized to acquire, by condemnation, any estate or interest for public use in the property sought to be condemned, as alleged in said paragraph Tenth of plaintiff's said (Second) Amended Petition, and that the attempt of plaintiff to condemn the real estate upon which the Library building is located, as therein alleged, is illegal and void.

For further answer to plaintiff's said (Second) [fol. 409] Amended Petition in Condemnation, this defendant, Iska W. Carmack, alleges for herself and others similarly situated, that the right, title, or interest in or to the property sought to be condemned, and the right of said defendant, Iska W. Carmack, to appear and defend in this case, was found and declared in said opinion of the Circuit Court of Appeals in the above entitled cause, to be as follows:

"The property (sought to be condemned) is situated in the City of Cape Girardeau, County of Cape Girardeau, Missouri, and the United States seeks to condemn it as a site for an United States Post Office and Custom House. The land was originally conveyed in 1807 by its then owner, Louis Lorimier, to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the 13th day of January, 1806, to have the Seat of Justice of that district permanently fixed upon his land at that place. The deed contains provisions in the nature of conditions or limitations that the land so given should 'be and remain forever common and public, and never to be appropriated to private use, agreeably to the explicit intention of the donor.'

[fol. 410] "In 1814, the Seat of Justice having in the meantime been removed from Cape Girardeau to Jackson, the judges of the Court of Common Pleas in form conveyed this tract to the heirs of Louis Lorimier, and on September 11, 1820, all of the heirs of Louis Lorimier, deceased, conveyed the premises by quit claim deed to the inhabitants of the Town of Cape Girardeau collectively 'for their use, benefit and behoof forever.'

"This deed conveyed certain other property not here involved, and concluded with the following paragraph:

" 'Provided always that the several tracts or parcels of land thus granted to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property.' "

"For further answer to plaintiff's said (Second) Amended Petition in Condemnation, this defendant, Iska W. Carmack, alleges that the law applicable to the facts in this case, as found in the said opinion of the Circuit Court of Appeals in the above entitled cause, is the law of the State of Missouri as declared by the Supreme Court [fol. 411] of Missouri with respect to the power of the City of Cape Girardeau to exchange or convey the property here involved:

(1) that the Supreme Court of Missouri has passed upon the deed of September 11, 1820, and held that said deed conveyed the property therein described, in trust;

(2) that the City of Cape Girardeau, under said decision of the Supreme Court of Missouri, has no power to alien or convey the property involved in this proceeding;

(3) that the plaintiff has no right to effectuate an alleged contract with the City Officials of the City of Cape Girardeau, under the decision of the Supreme Court in the case of Board of Regents vs. Painter, 102 Mo. 464; 14 S. W. 938, for the acquisition of the property sought to be condemned, which said opinion is made a part of this paragraph of this answer, by reference; and

(4) that this proceeding, purporting to be instituted for the purpose of condemning the property described in plaintiff's said (Second) Amended Petition, is not in good faith an attempt to condemn property under the law and regulations referred to and relied upon in plaintiff's said (Second) Amended Petition, but this proceeding is, in fact, [and] arbitrary and improper attempt to effectuate an unlawful agreement or arrangement to acquire said property under the guise of a condemnation proceeding pursuant to law."

And further:

[fol. 412] "This defendant, Iska W. Carmack, further answering plaintiff's said (Second) Amended Petition, denies that there was ever any investigation made as to the necessity of condemning Public Property as a site for the construction and erection of a new Post Office and Custom House Building on the property sought to be condemned;

that the engineers, architects, and inspectors for the Administrator of the Federal Works Agency of the United States, failed to consider the City Plan of the City of Cape Girardeau in existence at the time said arbitrary and improper action was taken by said Administrator of the Federal Works Agency was theretofore adopted and passed on as a zoning and city plan ordinance No. 566 on the 25th day of April, 1929, said ordinance being known as the "Bartholomew Plan" which has been followed by the City of Cape Girardeau since its adoption, and the said Administrator of the Federal Works Agency was not informed, as he should have been, by the City Officials of the City of Cape Girardeau, that because of said Ordinance No. 566, Hayor Hinkle Statler of the City of Cape Girardeau, Missouri, and Raymond E. Beckman, Philip Steck, and Frank Batschelor, City Commissioners of the said City of Cape Girardeau, did not have authority to enter into any agreements to dispose of said public buildings and public park sought to be condemned in this proceeding; that it was necessary and proper for the plaintiff to investigate all [fol. 413] of the facts relating to the matter of selecting a suitable location for the new Post Office and Custom House Building, including the Bartholomew Plan.

"This defendant, Iska W. Carmack, further alleges that she is informed and believes, and states the fact to be; that the investigators, engineers, and architects representing said Administrator of the Federal Works Agency of the United States, found that the present Post Office site upon which is located the present Post Office building, together with a lot immediately East of it, which could be readily acquired by the Government from Herman Bremermann, was the proper place for the location of the new Post Office and Custom House Building.

"That the arbitrary and improper selection of said Public Property sought to be condemned in this proceeding, was and is in violation of said Bartholomew Plan and contrary to the policy which has been pursued by the City of Cape Girardeau since the adoption of said Plan.

"That any proper investigation, as contemplated and required by existing law governing this proceeding, would have developed that the present Post Office Building and the lot lying immediately East thereof and adjacent thereto, was found by the investigators of the Government to be the suitable and proper place to locate the proposed new Post Office and Custom House Building."

[fol. 414] And further:

"Further answering plaintiff's said (Second) Amended Petition, this defendant, Iska W. Carmack, says:

"That the Public Property sought to be condemned, was deeded by the owner, Louis Lorimier, to the Commissioners and Assessors in and for the District of Cape Girardeau, in behalf and for the use of said District, in trust, for the purpose of having the Seat of Justice of said District permanently fixed on said land, and other conditions therein set out, and which includes the land herein sought to be condemned by plaintiff's said (Second) Amended Petition. Said deed is hereinabove referred to as the Deed of July 29, 1807, recorded in Book B at page 15 of the Land Records of Cape Girardeau County, Missouri. This defendant states that said deed was made as a gift to the Commissioners and Assessors, in trust, for the District of Cape Girardeau, in the Territory of Louisiana, pursuant to an agreement by and between said Louis Lorimier and the inhabitants of the said District of Cape Girardeau, and in compliance with all of the recitals set out in said Deed of July 29, 1807. Said property has, ever since the date of said deed, been held, in trust, and maintained as Public Property as hereinabove described.

"This defendant alleges that she is a direct heir of Louis Lorimier, deceased, and that said property sought to be condemned under the provisions of said deed was not in- [fol. 415] tended by said Louis Lorimier to be used as a site for a Post Office or Custom House; therefore, this defendant, for herself and others similarly situated as

direct heirs, or as inhabitants, citizens, taxpayers, and lot owners, as aforesaid, appear as defendants herein, for the purpose of asking this Honorable Court to prevent the condemnation of said Public Property in violation of said trust created under said deed of July 29, 1807.

Defendant, Iska W. Carmack, further states that in the event of a violation of the terms of said deed, the title to the property therein described will revert to this defendant and other direct heirs of Louis Lorimier, deceased; that if a change in the use of said property sought to be condemned be brought about by condemnation, or otherwise, the said Real Estate, or the proceeds received therefrom, will revert back to the Grantor or the heirs of the said Louis Lorimier, the Grantor in said deed, of which this defendant, Iska W. Carmack, is a direct heir.

"This defendant, Iska W. Carmack, for further answer to plaintiff's said (Second) Amended Petition in Condemnation, says that she is informed and believes, and states the fact to be, that the Public Property sought to be condemned is not fitted or suitable as a location for a new Post Office Building in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, for the following [fol. 416] reasons, among others, to-wit:

(1) That said property is used for public purposes, according to the undisputed facts as found by the said Circuit Court of Appeals in the opinion of the said Circuit Court of Appeals in the above entitled cause and made a part of the record in this case, as aforesaid:

(2) that the approach to said property sought to be condemned, from the West, is what is commonly known as a deadend street, which ends at said public property;

(3) that the location of the Court House Building now on said public property, which plaintiff proposes to use as the site for the construction and erection of the said new Post Office and Custom House Building is approximately blank feet from the West property line of the Public Property sought to be condemned in this proceeding;

(4) that the approach to said Public Property from the East is a deadend street which ends at the East side of said property, a distance of approximately blank feet

from the East property line of said Public Property sought to be condemned in this proceeding, and it is necessary to climb approximately blank steps to reach the level of the site sought to be condemned from the East property line of said Public Property;

(5) that it is approximately blank feet from said East [fol. 417] property line of said Public Property to the East side of the said Court House Building;

(6) that there are no streets adjacent to the said Court House Building on either the North or South side of said property sought to be condemned in this proceeding;

(7) that the property sought to be condemned, is not suitably located or fitted for use as a new Post Office Building in said City of Cape Girardeau, Missouri;

(8) that there is now available much private property suitable and fitted as a location for a new Post Office and Custom House Building in said City of Cape Girardeau, Missouri;

(9) that the public property sought to be condemned herein, was arbitrarily and improperly selected as the location for the new Post Office Building by said Administrator of the Federal Works Agency without taking into consideration the necessary facts as required by existing law and regulations governing the procedure of said Administrator of the Federal Works Agency and others charged with the duty of selecting a suitable and fitted location for a new Post Office and Custom House Building in the City of Cape Girardeau from available private property suitable and fitted for a location for the said new Post Office and Custom House Building in said City of Cape Girardeau;

(10) that said Administrator of the Federal Works Agency, and others charged with the duty of selecting a [fol. 418] suitable and fitted location, as aforesaid, without destroying public property as aforesaid, did, as the result of representations made by a small group of business men of said City of Cape Girardeau, Missouri, and because of the influence of said group, arbitrarily and improperly select said Public Property, contrary to and in violation of existing law as construed by courts of competent jurisdiction; and

(11) that plaintiff's said (Second) Amended Petition filed herein, is inconsistent with the opinion of the Circuit Court of Appeals in the above entitled cause, and made a part of the record of this Court in the above entitled cause, as aforesaid.

"Wherefore, this defendant, having fully answered, prays that the condemnation proceedings in this cause be dismissed, or that in case the property described in plaintiff's said (Second) Amended Petition is condemned, then and in that case, this defendant and those in similar relationship to Louis Lorimier, and similar circumstances, be allowed payment for the full value of her and their interests in and to said property, and for her costs, and for whatever other orders that to the Court shall seem just and proper."

Mr. Mac Leod: Is this all going into the record?

Mr. Kelso: Yes.

Mr. Emmert: The Court of Appeals then did not decide that the city officials should maintain it?

[fol. 419] Mr. Kelso: The Court said they owed the duty to do so.

Mr. Hasson: That they were?

Mr. Kelso: I think it is clear.

Mr. Mac Leod: The opinion speaks for itself. We do not need to go into that.

Mr. Kelso: Yes. It does.

Mr. Mac Leod: Mr. Kelso, you are asking for these witnesses to have their depositions taken. Mr. Emmert, can you tell us about these various witnesses? Let us see where we are on it in regard to the various people involved.

Mr. Emmert: Mr. Witman is here and now available. And—

Mr. Mac Leod: Let's take them in order.

Mr. Kelso: One moment —

Mr. Emmert: Mr. Witman is here and now available for examination.

Mr. Kelso: Yes.

Mr. Emmert: Mr. John N. Edy is no longer with the Federal Government, but he is the City Manager, I understand, of the City of Houston, Texas.

Some of the other gentlemen I am not sure whether they are still with the Federal Works Agency or not. Some of them I understand are not.

[fol. 420] Mr. Mac Leod: Let's take each one in order and go down the list.

Mr. Emmert: Others on the list could not be made available this afternoon, and I would have to arrange a time specifically for them.

Mr. Kelso: That is agreeable.

Mr. Emmert: H. A. Tucker is no longer with the Public Buildings Administration. He is in private business, I understand —

Mr. Witman: Out in Oklahoma, I hear.

Mr. Emmert: —out in Oklahoma.

Mr. Kelso: Yes.

Mr. Emmert: Mr. M. A. E — Deutsch is also no longer with the Public Buildings Administration.

Mr. Witman: He was not with us in the first place.

Mr. Emmert: He was with the Post Office Department and he is now in the Army.

Mr. Kelso: Yes.

Mr. Emmert: Mr. H. S. Roome is no longer with the Public Buildings Administration, and I have no address on him. I might be able to get the address but so far on this short notice I have not traced him. He is retired I understand.

Mr. Kelso: I understand he is here somewhere though.

[fol. 421] Mr. Emmert: More specifically, Colonel Carey is with the Federal Works Agency, but is out of the country and in Puerto Rico.

The others not specifically mentioned could not be made available this afternoon. I would expect that they could be made available at some agreed time.

Mr. Mac Leod: Well, do you have any suggestion as to the time on any of them, and let's see where we can get on this.

Mr. Emmert: I must confess that it is not easy on a matter of this kind to garner together the highest officials of an Agency of this kind. I am unable, therefore, to say now just when they could be made available, but I would expect that they could be made available at some time that could be made mutually agreeable to counsel.

Mr. Mac Leod: Well, now, go on down the list and give us your opinion — Mr. Reynolds, can you fix any time for him?

Mr. Emmert: I would not undertake at this moment to fix a time for him or any of the others. No one less than the President could expect to walk into an agency of this kind and have the officials jump together at one moment and on quick notice.

Mr. Mac Leod: I agree with you.

[fol. 422] Mr. Hasson: We can take a few at a time as it suits their convenience.

Mr. Kelso: I think that your statement is all that can be asked today or tomorrow. I certainly would not want them sitting around without anything to do — waiting. I would want to take them promptly.

Mr. Mac Leod: You are willing to leave this, then, at Mr. Emmert's suggestion that he will arrange for the taking of their depositions when it is possible?

Mr. Kelso: I agree to that and so stipulate, within a reasonable time, of course. All I want to do is to meet their convenience and that is what I have been trying to do all along as we have been going into the matter and discussing it, in fact, I have agreed to go to their houses if necessary, just whatever is necessary to suit their convenience.

Mr. Mac Leod: Well, of course, we can have them available at different hours of the day, from time to time, as we go along.

Mr. Kelso: You see, I have nothing else to do here but to dance attendance on the Department of Justice.

Mr. Emmert: How long do you expect to be here?

Mr. Kelso: Until I get through with the depositions, but I do hope that it will not take too long because of the very difficult hotel situation, because they take and put me [fol. 423] out on the street at the end of seven days, and then I have to jump all around again. You see, I was at the Statler and then they moved me over to this "shack" where I now am.

Mr. Hasson: Where did you have to move to?

Mr. Kelso: To the — what is the name of it — to the Carlton. Now they they are going to try to put us back. There is a question as to whether I will be back on the street or back at the Statler by Friday, and then we will stay there for whatever days the limit is. And then they will put us somewhere else, or we can go somewhere else, but we have to move. Therefore, I would like to get through as early as possible and get through with that inconvenience.

But I will say that I do not want my inconvenience to embarrass any of the witnesses, because I came here to take it and to suit the convenience of everybody.

Mr. Mac Leod: That disposes of that phase of it. Mr. Witman is here. Shall we proceed with him?

Mr. Kelso: Wait a minute. Let me get your name, please.

Mr. Emmert: My name is Emmert.

Mr. Kelso: Now, Mr. Emmert, to make myself very clear, you did not give me the name of Mr. Edy's successor.

Mr. Emmert: The position that Mr. Edy held has been modified in parts in so far as he was executive officer and

budget officer that position is now held by Mr. Ernest E. [fol. 424] Hall.

Mr. Kelso: Well, in the capacity that he acted when he signed the request to file the suit?

Mr. Emmert: He acted then as indicated, that day he just happened to be the Acting Administrator that day and signed whatever papers were put on his desk for signature. Mr. Edy, in addition to his other duties acted as Administrator in the absence of the Administrator at that time.

Mr. Kelso: Who was the Administrator, do you know?

Mr. Emmert: Mr. John M. Carmody was the Administrator at the time this request was made.

Mr. Kelso: Mr. John M. Carmody.

Mr. Emmert: Yes.

Mr. Kelso: Now, is Mr. Carmody with you?

Mr. Emmert: Mr. Carmody is the — a Commissioner of the Maritime Commission.

Mr. Kelso: It means he is not with you here?

Mr. Emmert: That is right.

Mr. Kelso: He is no longer with you, but he is with the Government?

Mr. Emmert: Yes.

Mr. Kelso: Very well.

Mr. Emmert: As to Major General Philip D. Fleming now —

[fol. 425] Mr. Kelso: I have asked for the General.

Mr. Emmert: Yes.

Mr. Kelso: It should be there.

Mr. Emmert: Do you intend to ask for General Fleming?

Mr. Kelso: Yes. You see, the General signed this last request to institute this particular suit. It was signed by the General, which makes it incumbent upon me to take his deposition for whatever it might be worth.

Under him is Mr. Tucker on that list?

Mr. Witman: Tucker was Associate Architect in the office of the supervising architect of the Public Buildings Administration.

Mr. Mac Leod: I think if you are going to ask all these questions—

Mr. Kelso: I shall try.

Mr. Emmert: You have asked for these people, and we have told you where they are and when they will be here or will. I will give you that.

Mr. Mac Leod: You have all of that information now. Let's go ahead.

Mr. Kelso: May I save a lot of time and grief by giving the gentleman who is going to get this together my view on the situation? I shall start in with my witness today. I started in with my notice to take depositions with [fol. 426] the idea that all that would be required would be to find somebody, directed by General Fleming, who would be in charge, or who had the custody or control of the custodian at least of Mr. Roome's report, Mr. Tucker's report, and any other reports filed.

I do not intend to let Mr. Roome testify as to what was in his report.

I do not intend for Mr. Tucker to change his report in any testimony.

But, I think that the usual way would be, if available, would be to let Mr. Tucker, if it was insisted on, and he was here, to identify his report. I think I can do it otherwise than to have Mr. Deutsch identify his report. Now, Mr. Deutsch is in the Army; Mr. Tucker is somewhere else, and Mr. Roome is out here somewhere, retired.

To get the matter clear if you say to me thirty minutes from now that they did not do that, what I want is the name of the party who is actually in charge of these reports, who is the custodian.

Mr. Mac Leod: Mr. Kelso, you gave us this list of names, sir. It includes a number of officials. We are

arranging to have them here. Now, certainly you admit that some of these gentlemen are now working for the Federal Works Agency, and these questions that you are asking about this custodian, let's have that testimony given [fol. 427] by some one testifying whom you can ask anything you want, and they will reply.

We are not saving any time by going over this informally on the record so to speak. We are here to take depositions.

If you want to take Mr. Witman's deposition he is here, and let us go ahead. If you want to find out where the records are, ask the witness. I do not think it will save any time in following any other procedure.

Mr. Kelso: I do not understand that there is any man here better equipped to give the information and to get in touch with the witnesses than the General Counsel, who said he would be cooperative and, in fact, that he was here for that purpose. I wanted to have him understand exactly what I was after in order to shorten the proceeding as much as possible. I am perfectly willing to undertake any procedure that will lead to the shortest possible solution of the matter.

Mr. Emmert: Yes.

Mr. Hasson: He is arranging to make available all of the witnesses except the ones that he has excepted as being physically away.

Mr. Emmert: Yes, we will make available all of the witnesses save the ones that are away, Col. Carey, for instance, is in Puerto Rico, and as to all of the others they [fol. 428] can be produced from time to time. Do you want to call some one else that is not named on this list of witnesses that you have here?

Mr. Kelso: Let the record show that the notice to take depositions specifically shows that, so you will again know, that I wanted to see all of the reports, the reports being—

Mr. Mac Leod (Interposing.): Let me interrupt you. You, as far as I know, have not asked for them yet. You have not called for them. You can ask for them here and it will be taken up at that time.

What do you want to do now? Take Mr. Witman's deposition?

Mr. Kelso: I will proceed with that now.

E. R. WITMAN was thereupon called as a witness for the defendant, Iska W. Carmack, in the above entitled case, and, the oath having been waived, deposed and answered to questions propounded by counsel as indicated hereinbelow, and testified as follows:

Direct Examination.

By Mr. Kelso:

Q. Please state your name for the record.

A. E. R. Witman.

Q. That is spelled "W-i-t-m-a-n"?

[fol. 429] A. Yes.

Q. Mr. Witman, you are described as the Fiscal Agent of the—

A. (Interposing.) May I correct that? I am the Fiscal Manager.

Mr. Mac Leod: Mr. Witman, I think I told you that we were not taking the oath of the witnesses but at the same time you are just the same as testifying under oath at this time with the same force and effect.

Mr. Hasson: We have waived the oath on all of these witnesses.

Mr. Emmert: I see.

By Mr. Kelso:

Q. I am assuming that you will tell just the same facts, Mr. Witman, that you would if you were sworn as a witness here. A. Yes. Of course.

Q. What are your duties, just broadly and shortly, as Fiscal Manager? A. Fiscal manager.

Q. What are they?

A. I have charge of the budget and financial set up of the Public Buildings Administration, also, I have under my charge the Administrative Services Division, which includes the materials and files division, among other ad-

[fol. 430] ministrative services.

Q. How long have you been in the office of Fiscal Manager, please? A. When was F. W. A. set up?

A. Voice: July 1, 1939.

The Witness: July 1, 1939.

By Mr. Kelso:

Q. Then you were Fiscal Manager at the time the money was set aside for the building or the construction of a new post office and custom house at Cape Girardeau, Missouri? A. That is correct.

Q. That was $400,000 some odd?

A. $30,000 more. $430,000.

Q. For building and site? A. Site and building?

Q. Both? A. Yes.

Q. Now, since that time what disposition has been made of that money?

A. That money is still available for construction—for acquisition and—acquisition of the site and the construction of the building.

Q. Then, if you acquired a site at Cape Girardeau that required cash to pay for the site, you are prepared to take it, and if you acquired a site at Cape Girardeau that [fol. 431] did require any cash to pay for the site, you are prepared now out of those funds to pay for it?

A. Yes. If we had to pay for the site, we would pay for it out of those funds. The money would be there.

Q. The money would be available to pay for any site you may select? A. Yes, sir.

Q. You are not on any of these Boards—

Mr. Mac Leod (Interposing.) Mr. Kelso, I do not want to make objections here, of course, we are waiving any objections as to form, so, of course, you can elicit that information, all the information that you want by leading questions; but I still think you should avoid leading questions as much as possible.

Mr. Kelso: I do not think I could lead Mr. Witman, from my observation of him in the last thirty minutes. But, I shall try not to ask leading questions.

Mr. Mac Leod: You are examining him on direct, now.

Mr. Kelso: Yes.

Mr. Mac Leod: This is direct examination. And we have no stipulation as to the form of the questions. So, I am objecting to the form of your question as leading.

By Mr. Kelso:

Q. Are you a member of any Board or Committee that—[fol. 432] well, I will put it this way, if you are going to be technical about it—

Did you participate as a member of any Board or Committee in the selection of a site for the Cape Girardeau new Custom House and Post Office and Federal Court building?

A. I served with the Joint Federal Works Agency Committee designated to select the Post Office and Federal Building? Yes, I did. That is correct.

Q. Who comprised that Committee at the time the order was made to institute this suit in condemnation proceedings, Mr. Witman?

A. Mr. Walter Myers, Fourth Assistant Postmaster-General; W. E. Reynolds, Commissioner of Public Buildings.

Q. Well, now, you have given the names of two men?

A. Yes, sir.

Q. Did you participate in the matter to the extent of voting in the selection of a site?

A. The Commissioner of Public Buildings and the Fourth Assistant Postmaster-General each have an Assistant who helped in considering these site selections.

Mr. Mac Leod: Mr. Witman, I do not think that is responsive to the question.

Mr. Kelso: That is a direct answer to the question, yes.

Mr. Mac Leod: No.

[fol. 433] By Mr. Kelso:

Q. Did you—

Mr. Mac Leod: His question was: Did he participate? He can answer that with a "yes" or a "no." In answering he is volunteering information. I want an answer to the question and nothing more, Mr. Witman.

The Witness: The answer to it is,—yes.

By Mr. Kelso:

Q. Now, then, whose assistant—did you state whose assistant you were at that time?

A. Naturally, I assisted the Commissioner of Public Buildings.

Q. You were acting as the assistant to the Commissioner of Public Buildings? A. Yes.

Q. Now, who acted as the assistant to the Postmaster General? A. Mr. Joseph F. Betterley.

Q. Now, then, when was that first order made to or requesting—when was the first request made on the Department of Justice to institute condemnation proceedings in Cape Girardeau to condemn the court house and public park?

Mr. Mac Leod: I do not think that is the best evidence of that.

Mr. Kelso: I hope it is not, and that we get the other [fol. 434] but this witness was familiar with the facts and I think I can ask him anything I want to about it that he may know.

Mr. Mac Leod: Read the question.

(The question was read by the reporter.)

Mr. Kelso: I will ask you this: When was the first request made on the Department of Justice to institute condemnation proceedings in Cape Girardeau to condemn the court house and public park?

Mr. Mac Leod: That is a direct question.

The Witness: Can I refresh my memory on that. I looked it up.

Mr. Mac Leod: You did not make any request.

The Witness: The men on the committee made the request, I think. I presume you refer, Mr. Kelso, to the request of the Administrator?

Mr. Mac Leod: Mr. Witman, his question was very clear, and I do not think that you can assume anything.

His question was: When did you make the first order on the Department of Justice to institute the condemnation proceeding?

The Witness: Of course, I made no request.

Mr. Kelso: All right. We will be technical as the [fol. 435] gentleman would have us be. There was a request made as a result of your conferences, namely, the conferences held by the gentlemen who have heretofore been named as comprising this board whose duty it was to select the site of the Cape Girardeau court house and post office; is that right?

The Witness: I would like to have the question read.

(The reporter read the question.)

The Witness: The request was made by the Federal Works Administration, or the Acting Federal Works Administrator as a result of a selection made by the Postmaster General and the Federal Works Administrator.

By Mr. Kelso:

Q. But the Postmaster General, did he sit in on any of these conferences?

A. The Fourth Assistant Postmaster General, his designated representative to sit in on those conferences, sat in.

Q. Did General Fleming sit in on any of these conferences there? A. No.

Q. Are you familiar with the number of hearings held by the members of your committee; that is what you call it, isn't it? A. Committee—yes.

Q. Are you?

[fol. 436] A. Yes.

Q. How many meetings were held?

A. I would not be able to state that without going over the records, but there were a number of hearings there that they had over quite an extended period of time.

Q. Well, would you be able to get the record showing the different hearings, and the names of the persons appearing before the Board in those hearings?

A. That could be assembled.

Q. Who would have charge of that record? Would that be available to you?

A. I have charge of the record. Yes.

Q. Well, will you be kind enough to assemble that information as soon as you can conveniently do so that I may have you put into the record the facts that you say

you could not give without refreshing your memory from that record?

Mr. Mac Leod: I want to let the record show at this time that we object to the offering of the records as they are confidential Government records.

Mr. Kelso: We have not gotten to that "terrible" thing yet.

Mr. Mac Leod: I see.

By Mr. Kelso:

Q. You are going to give me the facts, and tell me how many hearings were held and who appeared, and who [fol. 437] was present? A. Yes.

Q. Now, then, that same record would disclose how many Site Investigators examined sites at Cape Girardeau for your Committee, would it not?

A. It might.

Q. Well, is it possible that the Site Investigators would make an investigation and a report which would not be made a matter of record?

A. You asked me for the record as to the number of hearings held, and the number of people who were there.

Q. This is a different thing. A. Yes?

Q. I am asking you this: Is it possible that the Site Investigators would make an investigation and a report which would not be made a matter of record?

A. If you wish that included it could be done. Yes.

Q. Then, you will be able to include in the report that you may be examined about later on, in the making of these depositions, that information, will you, as to the number of Site Investigator's reports, and who made them? Is that right?

A. That is correct.

Q. Could you ascertain the number of architects who went down to Cape Girardeau, if any, for any of those purposes?

[fol. 438] A. Yes.

Q. Now, then, for information, while we are on this matter, Mr. Roome is referred to as Liaison Officer.

A. Yes. He is.

Q. What does that mean? What are his duties?

A. His duties were to make special trips to special parts of the country on various matters, whether it be site investigations, or others, as required by the officers—or otherwise.

Q. And the report on file with your committee made by Mr. Roome would show the purpose for which he went to Cape Girardeau in connection with this Post Office site?

A. Yes. It would.

Q. I would like for you to look up and see what his instructions were.

Mr. Mac Leod: So that the question—

Mr. Kelso: It is the same as the others.

Mr. Mac Leod: The same? All right.

By Mr. Kelso:

Q. Now, what were Mr. Tucker's duties?

A. He is one of the architects in the office who worked on the design and development of drawings for Federal buildings around.

Q. His duties began after the site had been selected by [fol. 439] somebody; did they not?

A. They may be.

Q. Well, he was not in any capacity authorized to act as a site investigator and report on the site the same as Mr. Deutsch?

A. No. He was not.

Q. I would like to learn as soon as possible what Mr. Tucker's duties were under your instructions when he visited Cape Girardeau.

A. All right. I will include that.

Mr. Mac Leod: You are not asking him that now?

Mr. Kelso: No. He is going to get that. He would not know it from memory at the moment, he might, but he wants to be sure.

By Mr. Kelso:

Q. Now, did I ask you to ascertain the instructions given to Mr. Roome when he visited Cape Girardeau?

A. You did.

Q. I did? A. Yes, you did.

Q. To make very certain that I made no oversight, Mr. Witman, have I asked you to assemble the information as disclosed by the records of your office showing the number of architects sent down there, and the number of site investigators sent down there, and who they were, and [fol. 440] the instructions they had? A. You have.

Q. I have? A. Yes. That is right.

Q. All right. And also Mr. Roome?

A. Yes. You have.

Q. Now, the next question: How long will it take you, Mr. Witman, to get that information from your records?

A. A few days.

Q. Well, I was not so particular about this as I was to guide ourselves as to the other parties; but you will be able to get it up in a few days?

A. Yes. I will.

Q. I think, Mr. Witman, that that is all I care to inquire about until we get this other information?

A. All right.

Q. And I certainly want to express to you my appreciation for your courtesy in appearing here and testifying thus far.

A. I am very glad to help.

Mr. Mac Leod: You are going to continue your examination of Mr. Witman at a later date?

Mr. Kelso: Yes.

Mr. Mac Leod: We will reserve our cross examination until after you complete your record.

[fol. 441] Mr. Kelso: Yes.

By Mr. Kelso:

Q. Now, then, Mr. Witman, you can get in touch with Mr. Emmert when you are ready?

A. Yes.

Mr. Kelso: And Mr. Emmert, you are going to let me know when he is ready?

Mr. Emmert: I will. I will do that.

Mr. Kelso: I do not care whom you communicate with, just so finally we get the information so I think I will

take them if you would rather it would be one who is ready, or some other witness who is ready.

I am trying to leave this whole question of the order of taking of testimony in one man's hands so that we will be certain not to have any conflict. So, Mr. Witman, you just report to Mr. Emmert.

Mr. Emmert: I just want to make it clear that I would advise Mr. MacLeod of Justice, and he, in turn, can advise you, so that everything will pass through the same office and it will all be in proper shape.

Mr. Kelso: I think that is perfectly proper.

Mr. Emmert: I would like to have it clear that I am not determining the order of the testimony. I will take any witness that you have ready.

That is, you name the witness and I will try to have [fol. 442] him ready for you.

Mr. Kelso: No, you are not determining the order of the testimony but if Mr. So and So says, "I will testify tomorrow", and Mr. Somebody-else says "I will not be ready for a week," I would like to take the man that is ready. I am not putting that responsibility on you, but I do not want to be understood as fixing any order of the testimony so that I will be bound by that.

Mr. Emmert: How do you want to do that?

Mr. Kelso: Well, now, we talked about Mr. Reynolds testimony. Now, shall we wait now until Mr. Witman assembles his information before going into the other?

Mr. Emmert: I might suggest this to ease my troubles:

I said that I did not control or would not fix the order of testimony. Could you tell me whether in any order you would like to have these people and I will see if I can arrange it that way.

Mr. Kelso: I think, if it does not require too much time that it would be very desirable to have finished with Mr. Witman before we go along with the others.

Mr. Emmert: All right, then. You want to finish with him?

Mr. Kelso: Yes, I would say it would not take us an awfully long time to get through with that. Do you think [fol. 443] so?

Mr. Witman: I do not believe so.

Mr. Kelso: Well, then, we will finish with him first and then after that we might take Mr. Reynolds.

Mr. Emmert: Yes.

Mr. Kelso: And then let us try Mr. Hunter.

Now, Mr. Reynolds may answer for all of those purposes.

And then let us have Mr. George Howe, Supervising Architect of Public Buildings Administration.

Then let us have Mr. Murray N. Davis, Supervising Engineer, Public Buildings Administration.

Then let us have Mr. C. J. Guthridge, Chief Planning and Space Control.

And Miss Lenora Kampainen, and Mr. Baird Snyder, Assistant Administrator, Federal Works Agency.

And Mr. E. E. Hall, Executive Officer, Federal Works Agency.

Colonel W. N. Carey, Chief Engineer.

Mr. Mac Leod: He is in Puerto Rico.

Mr. Kelso: Very Well. Who is the Chief Engineer now?

Mr. Emmert: Col. Carey.

Mr. Kelso: Was he the Chief Engineer at the time these matters were taken care of by Tucker and all these [fol. 444] other people?

Mr. Emmert: I do not think he was. I think he became Chief Engineer of the Federal Works Agency after the original selection of this site.

Mr. Kelso: I would like to know that, because I do not want to trouble a man if he did not know, and if he was not here.

Mr. Emmert: That troubles me greatly through all of those, I find, Mr. Kelso, that I understand you have made certain allegations which you found yourself unable to prove.

Mr. Kelso: No, I did not.

Mr. Emmert: And you come here and ask us to tell you who may be able to prove your case for you.

Mr. Kelso: No, I do not. I just ask you the name of your officers at a certain time.

Mr. Mac Leod: Let us get on.

Mr. Kelso: Now, then, Mr. Witman, when will you be able to go on with your list?

Mr. Mac Leod: Let us line them up in order. You want Col. Carey, No. 10. Who do you want for No. 11?

Mr. Kelso: Col. Carey, he says, is out of the country.

Mr. Emmert: But he may be here by the time we would reach him. I do not know.

Mr. Kelso: Then by that time we ought to be ready [fol. 445] for Postmaster General Walker, and for General Fleming.

Mr. Mac Leod: That is the order you want now on it?

Mr. Kelso: Yes.

Mr. Witman: I will be ready Friday morning at ten o'clock.

Mr. Kelso: If it will take that long—which is longer than I expected—suppose we try to take Mr. Reynolds tomorrow.

Mr. Emmert: I understood you to have him further down on the list—also that you were going to wait until you had finished with Mr. Witman before you started with any one else.

Mr. Kelso: I do not think that was settled finally any way, but we were just discussing it. I am simply trying to get along.

Mr. Emmert: I will see what I can do.

Mr. Kelso: Since you made that statement, Mr. Witman says it will take him until Friday morning at ten o'clock. So, it occurred to me that we might go ahead and take Mr. Reynolds, and General Walker and Col. Fleming, or rather General Fleming.

Mr. Emmert: Well, again, that is another order.

Mr. Kelso: It was just a suggestion. All right. We are just to go ahead with the previous order.

[fol. 446] Mr. Emmert: I want to get this settled.

Mr. Mac Leod: You have Witman, Reynolds, Hunter, Howe, Davis, Guthridge, Miss Kampainen, Snyder, Hall, Carey.

Mr. Kelso: Is Miss Kampainen in this office?

Mr. Mac Leod: We will arrange with her, you do not care where you take them?

Mr. Emmert: What I want to get straight is what I am to undertake today.

Mr. Kelso: All right.

Mr. Emmert: At first you said you did not want to take any testimony until you had finished with Mr. Witman.

Then, when he announced that he could not get this information together until Friday morning, then you want to get some one else. You had Miss Kampainen 7 on your list. You will have to tell me the order.

Mr. Kelso: All right. We will take Mr. Reynolds. I will take them as they come.

Mr. Emmert: Being in order.

Mr. Kelso: All right.

Mr. Mac Leod: You do not want to wait until Friday?

Mr. Kelso: I misunderstood you, Mr. Witman. I did not think it would take so long. I would have been much pleased to have it first.

Mr. Emmert: We will recess the taking of these depositions, then until tomorrow, November 3, 1943, at 2:00 [fol. 447] o'clock p. m. Eastern Standard War Time at room 6324 Federal Works Building, at which time I will try to have Mr. Reynolds present for the purpose of taking his deposition.

Mr. Kelso: That is agreeable to me.

Mr. Mac Leod: Very well. I do not think there is anything further we can do today.

The Witness, E. R. Witman, was thereupon temporarily excused.

Whereupon the taking of depositions in the above entitled matter was thereupon duly adjourned to reconvene, by agreement of the parties hereto, at two o'clock p. m., in room 6324, Federal Works Building, Washington, D. C., November 3, 1943.

JOSEPH M. HALL,
Reporter.

Subscribed and Sworn To before me this 22nd day of November, 1943.

MARGARET C. SCOFIELD,
(Seal) Notary Public.

My commission expires Aug. 31, 1948.

[fol. 448] November 3, 1943.

By agreement of the parties, the taking of the depositions at 2:00 o'clock, November 3, 1943, at room 6324 Federal Works Building, Washington, D. C., was resumed at that time and place.

Whereupon, in room 6324 Federal Works Building, (formerly Old Department of Interior Building) Washington, D. C., beginning at 2:00 o'clock p. m. the following proceedings were had, to-wit:

Mr. Kelso: Are we ready to proceed with the taking of the depositions as arranged for on yesterday?

Mr. McNerney: I am Harry J. McNerney, Special Assistant to the General Counsel, Federal Works Agency, and I am appearing in the absence of Mr. Emmert, and speaking for the Agency.

Mr. Kelso, following the conclusion of yesterday's session we have been giving consideration to this whole general matter. And I am speaking now on behalf of the Agency. And we have concluded that we can not comply with your request to interrogate all of the list of witnesses you specified yesterday, inasmuch as it appears to us that you do not have thoroughly in mind the functions of those individuals with respect to this site. And, the gentlemen on the list being busily engaged in our war activities are too busily engaged in such war activities to take time out [fol. 449] therefore, for what appears to us to be unnecessary questioning.

However, we are prepared to furnish you with a statement of facts relative to the acquisition of this site, together with proper data that is pertinent to it, and we will stipulate upon that.

We will also be agreeable to making available any officials that you may select after you consider that statement, those officials to be made available for interrogation based only on written interrogatories or a specified line of testimony, and their testimony to be limited to that line.

Now, that is our proposition now, and if that is not satisfactory to you, why, I think you should have recourse to the Court.

Mr. Mac Leod: Well, I think we ought to say too—

Mr. Witman: I would like to say—

Mr. Mac Leod: Wait a minute. I want to say, Mr. Kelso, in addition to what Mr. McNerney said, we have no desire whatever to inconvenience you in this case, or in the presentation of your case.

We want to have the case disposed of, and the issues met and ruled upon and decided too, at the same time. But, it seems to me we have—there is a big organization here. And you have a large list of names that you presented.

[fol. 450] The record of yesterday's hearing here of the testimony shows that really you have, as far as we can see, no definite object to your testimony, and no definite idea as to whose testimony you want.

And your notice really could permit the taking of [testimon] of anybody in the Federal Works Agency, and, almost, in the Government.

And when we asked you to specify, with the idea of making available any of these witnesses, you picked names out of the Congressional Directory. And we just do not feel that we can submit the Government or the Federal Works Agency to any such inquisition, really.

And for that reason, we want to try to agree with you to a form of procedure that will answer your purpose, and also not submit these people named to undue inconvenience and trouble as well as ourselves.

Mr. Mc Nerney: I might say further to Mr. Kelso now, in line with this statement of fact—

Mr. Mac Leod: I was just coming to that. We intend to furnish to you a statement of fact which will be furnished to you at a definite time. When would you say, Mr. McNerney?

Mr. Mc Nerney: About Saturday.

Mr. Mac Leod: By Friday or Saturday. We will furnish you with what we consider the proper statement of the facts and statement of the evidence.

[fol. 451] Those facts will be what in our opinion are pertinent, proper, and germane to the issues in the case.

That statement may not necessarily agree with what you think the facts are.

We are doing it with no idea of depriving you of the right of eliciting the true facts. We think, as I said in my opening remarks, that if you will give us either written interrogatories, or if you will give us even an indication of the line of testimony that you intend to ask these witnesses or to elicit from the witness, or if you will even give us a limitation on the scope of the testimony or the scope of the questioning, we will arrange to make the men that you have named available at any reasonable time.

However, we do not think we can take the time and money to just go on asking questions in what is really in our opinion a fishing expedition.

Now, that is our position, and that is about all we can do on it.

Mr. Kelso: With respect to the matter of giving a list to counsel for the plaintiff, I think it is pertinent to say that at the time the list was called for at the outset of my conferences with the Department of Justice here in Washington, I tried in every way I knew how to arrive at some plan for shortening the taking of depositions.

I tried to work out some suggestion which would be [fol. 452] agreeable to counsel for the defendant, Iska W. Carmack, and to the Government, which at the same time would avoid all of the testimony that we are now talking about here.

I have no inclination at all to encumber the record with irrelevant matter.

Now, so far as resorting to the Directory, I think it is fair to say that Mr. Witman, who has been a great length of time at work in connection with this Department, it was necessary for him, the witness, to turn to the Directory, which was on his desk, to identify these people. And I do not think it could be done by any Government official in any other way.

Now, I said at the outset that I wanted the Members of the Joint Committee who selected this site, made the order requesting the institution of this suit that was brought, and took that action. I do not think it could be stated more clearly, more accurately than that fact.

All the difference between us then is that when I came into the room counsel for the Government said that I should give a complete list of everyone that I might examine. Well, like any other individual in this situation, in my desire to be courteous, and to afford them every convenience that they might want to pursue in checking up on the thing, I said that there were a number of these witnesses who may not be necessary, but I would not want to [fol. 453] be compelled to withdraw and close my deposi-

tions, if during the progress of the taking of the depositions it should develop that a witness whose name I did not have was the man who actually did the things into which I was inquiring.

Now, there has been no question of the fact that I wanted Mr. Reynolds because I said that to Mr. MacLeod the day I came into the City of Washington several days before the depositions were to be taken. At that time there seemed to be a misunderstanding as to the man that I referred to. And I was informed that Mr. Reynolds was no longer with this Federal Administrator. But at the present time I learn that Mr. Reynolds is with this Agency. And I understood that it was clearly agreed that it was a fact that at this hour I would be permitted to take Mr. Reynold's deposition.

Now, it may not be necessary to take all of those who participated in that Joint Committee, but if Mr. Reynolds can furnish the information that would be satisfactory, then that would be all that I would care to do.

Now, I think that I made it clear as I could, and that is the reason I am trying to get it re-stated, that what Mr. Witman would do would be to assemble certain information which he said was available, and which he said that he could assemble and that it could be produced by Friday morning at ten o'clock, or Friday at 2 o'clock at the latest.

So, I was trying to think along that line when I came in [fol. 454] here.

This, of course, is a new suggestion.

Now, I do not think there is or ever has been any question but what I asked for the Administrator; that is, General Fleming. I do not think there can be any doubt in anybody's mind but what I asked for General Walker. That is not for the purpose of taking up the time of these gentlemen, but these gentlemen signed the request to institute this suit to condemn the property that we are now inquiring about.

Mr. Mac Leod: But here is the point —

Mr. Kelso: If you will permit me to finish?

Mr. Mac Leod: I beg your pardon. Have you finished?

Mr. Kelso: No. I do not want to take a single witness' testimony that is not necessary, but I do not follow the suggestion of counsel for the Government at this time. If I do, and I am trying to state it as I think you intended it, — if not, why, now is the time for me to learn just what you have in mind.

Mr. Mac Leod: First, as I understand, you propose to —

Mr. Kelso: If I may continue to clarify that, I think it will save time.

Mr. Mac Leod: Yes. Go ahead.

Mr. Mc Nerney: Yes. Go right ahead.

[fol. 455] Mr. Kelso: First of all, as I understand the matter, you propose to hand to me a statement of what would amount to, in effect, an abstract of the reports referred to in the testimony of Mr. Witman, which he agreed to give on Friday.

Mr. Mac Leod: That is right, as to Mr. Witman, but that is not correct as to the other. This is not by any means to be an abstract of the reports, that is not it, or of anything else.

Mr. Kelso: Is it your intention merely for the Government to permit the counsel for the Department to state the conclusions of counsel as to what the witnesses would, perhaps, testify?

Mr. Mac Leod: Absolutely not. Absolutely not.

Mr. Kelso: I can not see how it would amount to anything else if you are going to abstract the testimony they might give; if allowed to testify, otherwise, what is it?

Mr. Mac Leod: Just this: We will give you a written statement, and we will agree that it may be stipulated — a stipulated statement of the facts for use in this case, or we will stipulate that these various men that you have mentioned would testify in the event they were called upon to testify to the facts, and that statement of facts will be a complee review of this case, all the facts that we con-[fol. 456] sider as pertinent to the issue of the selection of the land, reviewing just what happened — that the Site

Agent made the investigation, that he furnished the report, that the report showed such and so, and that it was referred to the Inter-Departmental Committee, the members of which were So and So, that the Committee met and considered it — now, you mentioned yesterday in your questions the number of times they met — we will specify the number of times that they met, their recommendations, that the matter was referred to the Administrator and to the Postmaster General, and they acted.

Now, of course, that is a very brief statement of what the report will show. It will be a complete statement of what the facts are, and will contain all of the facts that we consider pertiment to the issues in this case, and just what we feel these men would testify to in the event that they testified and their depositions were taken.

Now, in addition to that, if you care to stipulate as to those facts, we will stipulate them as facts; if you want these witnesses to sign these statements of facts, they will sign it.

In addition to that, if after reviewing it you think you have some further inquiry, they are willing to testify in answer to your inquiries as to any further pertinent matters, or we will give you a further written statement of the facts if they are pertinent.

[fol. 457] But, we feel that we should either have written interrogatories, or we should have a statement of the line of inquiry which you are going to follow so that they will know what questions they are going to be asked, so they can answer them — also, so they won't have to submit to any irrelevant questions that we do not feel they should answer.

Now, I think it is perfectly clear what we have in mind, and that is exactly what we are going to do.

Mr. Kelso: Of course, I have never had that situation presented to me at any time, and it gives me considerable concern, of course, right now, to know just what situation I am in. So, — you say that you will permit me to inquire a little further about it? If you will?

Mr. Mac Leod: Yes.

Mr. Kelso: Is it now the statement of counsel for the Department of Justice, and for the Federal Works Agency —

Mr. Mc Nerney: Federal Works Agency, yes.

Mr. Kelso: — that you will not permit counsel for the defendant, Iska W. Carmack, to see any report? Any report of the site investigators, architect, or liaison officer or agent referred to in the notice?

Mr. Mac Leod: I do not think that that question is before us right now.

Mr. Kelso: That is the question that is before me right [fol. 458] now, in order to understand these other matters.

Mr. Mac Leod: We are asking you if you want to proceed to take depositions with these various people that you have named, or whether you want to let us prepare a statement of facts.

I do not know what that statements or statement of facts will disclose, but it will be apparent when we furnish it to you.

As to what we are going to furnish as a part of it, I do not know. I do not know what the record in this case is. I do not know what the records of this Department are. I have not seen them.

That is a matter that will be apparent when the statement is furnished, and if then it does not have the information you want, then you can [given] us written interrogatories or limit the scope of your examination of witnesses and we will either have furnished written answers or we will [illegible] the witnesses available.

Mr. Kelso: Well, kindly let me say this — I would not want counsel to create the impression in this record —

Mr. Mac Leod: I am not creating anything.

Mr. Kelso: Wait a minute until I finish. —that I have done or said anything, or have been guilty of any conduct that would warrant the conclusion that I am making my inquiry not in good faith.

[fol. 459] Mr. Mac Leod: Well, there is no such thing intended, and I do not think the record shows any such thing.

Mr. Hasson: No, indeed.

Mr. Kelso: I just wanted the record to be clear as to that.

Mr. Mc Nerney: There is nothing like that at all.

Mr. Mac Leod: If you want your question in that regard put on the record, put it there.

Mr. Kelso: I want you to say it, if you think it is the fact.

Mr. Mac Leod: Certainly, there is no such impression whatever.

Mr. Kelso: Because, I do not want General Walker and Major General Fleming and these other gentlemen to conclude that that is true.

Mr. Mac Leod: What we want you to do, frankly, is this: Tell us what you want to know and we will try to answer it.

Now, then, it comes down to this: If you will tell us what you want to know, and we feel that it is pertinent and that we can properly let you have it, we will try to answer your questions; but we can not have fourteen or fifteen men ready to testify and interfering with their official duties just to have an extended line of questions that may [fol. 460] lead anywhere, — we don't know.

Mr. Mc Nerney: Let me make this explanation:

When Mr. Emmert showed me the list of individuals you had named yesterday, I recognized at a glance at the majority of them knew nothing about this transaction, had never had any connection with it, so it appeared to me that it would be a great waste of every body's time to bring them in here.

Mr. Kelso: Now, we are getting somewhere.

Will you put in the record at this time, Mr. McNerney, the names of the persons that within your knowledge had no knowledge of the facts in this case.

Mr. Mac Leod: That is not what he said. He said it appeared to him.

Mr. Kelso: I understood him to say — well, just let Mr. McNerney make his statement himself.

Mr. Mc Nerney: Well, for instance Colonel Carey had no connection with this proposition at all, I know that.

Mr. Hall —

Mr. Kelso: And who is Col. Carey?

Mr. Mc Nerney: Col. Carey's title is Chief Engineer, Federal Works Agency.

Mr. Kelso: Col. Carey had nothing to do with it then. Who is next?

Mr. Mc Nerney: Mr. Hall.

[fol. 461] Mr. Kelso: What is his full name?

Mr. Mc Nerney: Ernest Hall?

Mr. Kelso: What is his title?

Mr. Mc Nerney: His title is Executive Officer, Federal Works Agency.

Mr. Kelso: All right. Carey and Hall. Who else, sir?

Mr. Mc Nerney: I do not have the list before me now.

Mr. Kelso: Give him the list. This is a very fine way to do it. I will take your word for it, that they did not know anything about it.

Mr. Mac Leod: You do not have to worry about the list, Mr. Kelso. Now is not the time for you to be worrying about the list, or about the people you want or need. Here is our proposition.

Mr. Kelso: You are making the proposition on the ground that my requested list of names is unreasonable.

Mr. Mac Leod: Not only is the list of names, but the limitless scope of the questions. If you are to get some information about this case, if you indicate what you want to know, — what you want to know we will tell you who will testify as to that, and we will be frank to let you know who they are and whether they will be made available to you or not.

[fol. 462] Mr. Kelso: Just let us continue with the list for a moment.

Mr. Mc Nerney: George H. Field, Deputy Commissioner of the Works Projects Administration. George H. Butler, Director of Investigation.

Mr. Mc Leod: Better state their title, too.

Mr. Mc Nerney: Director of Investigation, for George H. Butler.

Mr. Hasson: I do not believe he asked for this, did he?

Mr. Kelso: Yes.

Mr. Mc Nerney: I am very doubtful if Mr. John N. Edy had anything to do with this transaction.

Mr. Mac Leod: He signed it. That is one of those he asking the testimony of probably for that reason.

You are asking him if he knew about it.

Mr. Kelso: That is all right. Just give the information that you have on it. I will take your word for it.

Mr. Mc Nerney: The exception would be that he was the Acting Administrator the day that the papers were executed, and he would have known nothing about it, and the signing of it would have been the only connection that he would have had with it because in the normal conduct of his duties he would not have acted on the matter. He [fol. 463] signed the original, that would be the only exception.

Mr. Mac Leod: Mr. Kelso, when you gave us that list of men you wanted to take them and just going through the Congressional Directory and taking the list of members of the Federal Works—I want to make one further statement on this.

Mr. Kelso: Let him finish the list.

Mr. Mac Leod: We asked you to give us the names of the witnesses, and you took the officers of the W. P. A., and I think we told you at that time that they had nothing—

Mr. Kelso: Mr. MacLeod, I am doing my best to get rid of the witnesses as fast as I can. I have no objection

to that. I have no desire to encumber the record with any unnecessary witnesses.

All right, Mr. McNerney.

Mr. Mc Nerney: Snyder, Assistant Administrator Federal Works Agency—Baird Snyder,—nothing.

Mr. Kelso: He had nothing to do with it?

Mr. Mc Nerney: Nothing.

Mr. Kelso: That is all right. I will take your word for it. Proceed.

Mr. Mc Nerney: Now, the name of Miss Kempaniam, Secretary to the Administrator.

Mr. Witman: She would not know anything about the thing.

[fol. 464] Mr. Mc Nerney: She would have merely taken the papers into the Administrator, or the Acting Administrator to see that they were executed and turned over for transmission to the mailing room.

Mr. Mac Leod: I think the point you made on her was that she may have some private papers from General Fleming that she may have access to, and she might even classify as a custodian of them.

Mr. Kelso: I do not want to be confronted with the situation when I come to making my record that that was in the custody of the Secretary, because I have always found that the Boards had someone who had the control and custody of the records under the supervision of somebody.

I do not and did not want to have one say that the only person who could produce that is this Secretary, and so I have explained that all the way [trhough], that if you said that she was not the custodian of any of these records, I did not want to take something that is not necessary to take.

Mr. Hasson: Mr. Witman stated, he said yesterday that he was the custodian.

Mr. Kelso: Then we will not need her. I did not know that at the time.

Mr. Hasson: And you subsequently added her name to the list.

[fol. 465] Mr. Kelso: No, her name was on the list from the beginning and I left it because Mr. Emmert insisted that I give him the names.

Mr. Mc Nerney: I do not believe Mr. C. J. Guthridge, Chief of the Plans and Space Control had any connection with this at all, or knew anything about it.

Mr. Kelso: Yes.

Mr. Mc Nerney: Also, Murray N. Davis, Supervising Engineer, I do not believe he had anything to do with it.

Mr. Kelso: All right.

Mr. Witman: Nor, George Howe, Supervising Architect.

Mr. Mc Nerney: I do not know what his duties were. Judge Kelso mentioned something about some architectural data.

Mr. Kelso: Yes.

Mr. Mc Nerney: Mr. Samuel Haber in my opinion would have nothing to do with that.

Mr. Kelso: He had nothing to do with it? All right. What is next?

Mr. Mc Nerney: Those names you see there are relatively few now left on the list.

Mr. Kelso: All right.

Mr. Mc Nerney: And that is what prompted us in our conclusion that we ought to try to channelize this inquiry [fol. 466] within the bounds of the individuals who possessed information that you were seeking.

Mr. Kelso: Right. I think you are entirely right. I want to say to you that I most heartily welcome this cooperation, and I accept your statement, which I am entirely satisfied with that these gentlemen had nothing to do with it, and it would be a useless thing to take their depositions.

You go right ahead and strike the names of all those that had nothing to do with it and knew nothing about it

from my list; that is what I have been trying to do right along.

I thank you for getting those out who knew nothing about it.

Mr. Hasson: Now, Mr. Kelso, do you want the statement of facts presented to which we can stipulate on this proceeding, with the written questions, as suggested, or do you insist on proceeding further?

Mr. Kelso: Now, we are getting along very famously now. I talked to you very kindly about this. You know as well as I do how anxious I am to get this down to a minimum and get it done.

Mr. Hasson: We are certainly all agreed on that.

Mr. Mac Leod: Yes, we want to clean it up.

Mr. Hasson: Just in an effort to get the facts together properly, that is in the minds of all of the parties from the high officials on down, and we want to save the time [fol. 467] of our high officials as much as possible. Can you give us an idea of what you have in mind?

Mr. Kelso: Let me make this statement, and if counsel for the Department follow it—

(At this point Mr. Witman left the room.)

Mr. Kelso: I will make it now, in Mr. Witman's absence from the room:

What I asked for—Mr. Hasson, I think will confirm this—what I asked for at the outset of this was this character of information:

The number of site investigators or site examiners who investigated possible locations for the new custom house and post office building at Cape Girardeau.

That I did not possess, and could not in the very nature of things possess it, and as I said to Mr. Hasson, it was a very easily obtained fact.

The next thing I wanted was the number of sites reported on by Mr. Deutsch.

Then I stated this very clearly that I knew beyond a peradventure of doubt the fact, but it would be necessary for me to have you stipulate to that fact, or to do the best I could to ascertain that fact.

Mr. Mac Leod: Did Mr. Kelso ever offer to stipulate to any facts?

Mr. Kelso: I said before I wanted to know how many [fol. 468] sites—he wanted to know.

Mr. Mac Leod: You never did with me. May be you have with some one else.

Mr. Hasson: Mr. Kelso—

Mr. Kelso: It is not a question of stipulation; you are asking what I wanted.

Mr. Mac Leod: You said you wanted to stipulate with us.

Mr. Hasson: I do not recall trying to stipulate as to anything. Let us limit it now to all of these things, so that all of these things will be included.

Mr. Mac Leod: Let him continue. He has other things he wants to find out.

Mr. Kelso: I am not injecting something new here. I laid everything down on the table some time ago.

Mr. Mac Leod: It is new to me. Perhaps it is not to some others.

Mr. Kelso: Well, you turned me over to Mr. Hasson and said go ahead with him.

Mr. Hasson: What was our understanding?

Mr. Kelso: I said I wanted to show in some way that Mr. Deutsch made recommendations as to the sites, and without going into the matters that you objected to, to show that the property sought to be condemned was not his Number 1 site of recommendation.

[fol. 469] Mr. Hasson: That is what you want?

Mr. Kelso: Yes.

Mr. Mac Leod: Go ahead.

Mr. Hasson: That is what you wanted, and I told you that regardless of his recommendation that whatever it was, it was purely advisory, and I would be glad to get it for you.

Mr. Mac Leod: Let us go on to perspective, instead of retrospection. You are talking about what you want to find out.

Mr. Kelso: Yes? Oh, My! My!, here there are five you all against me, and going at it, and now you have brought something new on me, and if you want me to answer under pressure and at the moment, well, just wait a minute, I am going to do the best I can for you.

Mr. Mac Leod: No, I am not trying to be discourteous.

Mr. Kelso: Yes? Just give me a moment.

Mr. Mac Leod: I do not intend to be abrupt, but—and I certainly apologize if I gave that impression—but what I am trying to find out is just what you are trying to find out, and established—once the facts are established we can get them in such shape that we can stipulate as to those facts. I do not think there is any question about the facts here.

[fol. 470] Mr. Kelso: Now, I am not interested in having your record show the valuation put upon any site. That was the thing that Mr. Hasson seemed to think was extremely important. That I am waiving from any report — I do not care what his valuations were.

But, I am anxious to establish the fact that, and I think it could be stipulated — and that goes back to the one that was — now how binding it is on the committee — but what his report showed. And I want him to let it be shown that this court house site was — or the property sought to be condemned was not the number one recommendation of Mr. Deutsch.

I know what Mr. Hasson said about the thing, about their not being binding on them and all of that, but that is what I wanted to have, his recommendation.

And then I wanted to know if any other men, other than Mr. Deutsch made any site investigation; if so, then I would want to inquire may be further as to that.

Mr. Hasson: Do you mean, for the purpose of selection?

Mr. Kelso: In Cape Girardeau.

Mr. Hasson: For the purpose of selection, not for investigation for any other purpose?

Mr. Kelso: That is right; for the purpose of selection, that is all.

[fol. 471] I want their recommendations as to the sites for this new post office and custom house, and the order of them, not the figures.

Do you know, speaking as the Assistant General Counsel for the Federal Works Agency, do you know, after looking into this matter how many site investigators reported on it; that is another question.

Mr. Mc Nerney: Not at this time.

Mr. Mac Leod: We will give you that information.

Mr. Kelso: I think it is fair.

Mr. Mac Leod: You are not testifying here, Mc.

Mr. Kelso: What I tried to do was to get them, Mr. Witman.

Now, I would like to make some inquiry of the architect, but that is a long drawn out thing. I think I can sit down with counsel and agree on a number of things as to that.

Mr. Mac Leod: We talked about a stipulation and we never could get anywhere.

Mr. Kelso: We never got anywhere.

Mr. Mac Leod: No, we did not.

Mr. Kelso: No, it was all my fault, but I just could not help it.

Mr. Mac Leod: It was mutual.

Mr. Kelso: This is a sort of difficult thing to specify, [fol. 472] but I will try to do so from these files.

I would want a statement of the petition — as to the number of names signed to the petition by the citizens of Cape Girardeau opposing the selection of the court house site for the Post office.

The record, as reported at that time said that there were 621 signatures or petitions filed with you protesting the proposed location of the new post office building on the court house site.

Mr. Mac Leod: Who said that?

Mr. Kelso: The Associated Press report, reporting on our meeting. It is just a newspaper statement.

Mr. Mac Leod: You previously said you wanted to make some inquiry of the architect?

Mr. Kelso: Yes.

Mr. Mac Leod: As to what?

Mr. Kelso: This came first.

Mr. Witman: That is the petition there, and not the poll?

Mr. Kelso: It is the protest.

Mr. Witman: What is not the poll that was taken.

Mr. Kelso: No. It is the protest. That is a thing that we did not get into the record at the other trial, and it did not seem to make much difference, but I thought I should like to put it in.

[fol. 473] Now, here is what I would want to inquire of the architect:

Something about this sort of situation as to the actual distances down there. He has a map.

Mr. Mac Leod: Just distances?

Mr. Kelso: I will want to ask him how far it is from the Lorimier Street plot line or sidewalk to the proposed west side of the new post office building as planned by the architect.

Mr. Mac Leod: You want information as to the project plan?

Mr. Kelso: Yes. The architect — I want the architect —

Mr. Hasson: The architect is now available; he is in Oklahoma.

Mr. Kelso: Well, his report is here, his plat is here.

Mr. Mac Leod: What you want is information disclosing what we call the project plan or site plan.

Mr. Kelso: And I want to get Mr. Howe — you still left his name there?

Mr. McNerney: I left him off because you said you had indicated some archictural data, and I did not know whether that would be supplied or come under Mr. Howe or not.

[fol. 474] Mr. Kelso: That was what I wanted.

Mr. Witman: He wants somebody else; Mr. Howe would not be particularly familiar with it.

Mr. Kelso: You know, Mr. Witman, and counsel what I want; I want to show from the man familiar with the actual site.

Furthermore, I want to show from the man who is familiar with the actual site that Themis Street as shown by your plat coming from the west side is a dead end street.

Then, I want to show — whatever the facts may be — that it is 150 feet, if it is a fact, from the west line of this dead end street going east to the west side of the proposed building.

Then I want to know, or in the same manner get a statement from the architect showing that this dead end street is again picked up as a dead end street on the east side of the court house — and that Themis Street to the river is two blocks, — and that this east side of the view is a bluff, and that it is necessary in approaching the project from the east side to climb steps, approximately 55 steps or 60 steps to the level of the ground.

Then, I want to show that there is no approach from any street to the property from the north.

I also want to show that there is no street on the south of this property.

[fol. 475] Then, I wanted to get from the architect or the proper official what I discussed with counsel for the Department of Justice at the outset, namely, whether there are any regulations or guide that you give to the party selecting the site with reference to the location of the building on streets.

To make it clearer, whether you have a regulation requiring post office buildings to be located on or near a street.

Mr. Mac Leod: I do not ever recall your making that request of me.

Perhaps, Mr. Hasson.

Mr. Hasson: Yes. He asked me about that.

Mr. Kelso: I started out with that a year ago and tried to get it into the other case.

Mr. Hasson: Yes.

Mr. Kelso: I know.

Then, I stated I wanted to find out from the architect what, if anything, he planned to do with the building that is 150 or more feet from the west end of this dead end street, and that is on the place 60 steps up from the east.

Mr. Mac Leod: What building is this?

Mr. Kelso: That is the site that you selected there.

[fol. 476] Mr. Mac Leod: You say what he planned to do with a building 150 or more feet away.

Mr. Kelso: It is the custom house and post office building.

Mr. Hasson: The present building? You are not interested in the other?

Mr. Kelso: But it is all part and parcel of the question as to whether the property is better fitted than some other property — which is a judicial question.

Mr. Hasson: Oh, —

Mr. Kelso: Of course, you may laugh at it, and all of that, but the Circuit Court of Appeals found that, and I suppose it will be for them to change it if it is to be changed.

Mr. Mac Leod: Of course, what you want to know is where the Architect planned to place the new building; is that it?

Mr. Kelso: No. I want to know how far it is from the west street line to the west side of the proposed building. I have stated that already.

Then, I want to know how much of a climb it is on the bluff from the east side to the level of the ground on which you propose to locate the building.

Then, I want to know how far it is from the street line of Spanish Street, on the east, to the east line of the pro- [fol. 477] posed building.

Then, I want to know how far it is north from the proposed location of the new post office building and custom house to Broadway.

Then, I want him to state that his plats either do or do not show that there is no street or entrance to the post office site from Broadway, and that there is no entrance to it from the north.

I want him to also show that his plan does not show and can not show any street on the south side of the portion of the park selected.

Then, I want him to show that the public library building, —as now located, will be in front of the proposed post office building,—projects out in front of it on the west, to the west, on the west of the west entrance.

Then I want him to show that it will be necessary if they open it up to take down the trees on the west side of the site selected there in the park, or to show, as his picture shows, that everything west of the proposed site is taken up with trees, library, memorials of different kinds, whatever is there.

Now, those are in general the things that I wanted to ask the architect.

Mr. Hasson: Mr. Kelso, don't you think it would save a lot of time of you included these in a written inquiry that we have suggested?

[fol. 478] Mr. Kelso: I do not want to get to the point of written interrogatories if we can eliminate all of that.

I think this is the way—

Mr. Mac Leod: Here is our point—

Mr. Kelso: We are getting somewhere here now.

Mr. Mac Leod: But, Mr. Witman is only indirectly interested in these things. At the same time, he has other things to do now, and these other gentlemen. We are getting some place now. The line of questions that you are now outlining I think could be better presented in written interrogatories.

Mr. Kelso: I do not think it is fair to me—I do not really think it is fair to me to ask me for a lot of [wirtten] interrogatories.

Mr. McNerney: Let's go ahead.

Mr. Hasson: Mr. Kelso, after we present the stipulation of facts, which would include many of your questions, then your written interrogatories would be fairly limited, and we would know to whom to direct them.

Mr. Kelso: Now, listen, I am willing to do this, gentlemen: I am willing to sit down with Mr. MacLeod, or with Mr. Hasson, or probably better with the counsel for the Administrator and go over any of these things in detail, spending whatever time is necessary to point out what it is that I would like to stipulate, and in that way we [fol. 479] might do in a few hours what would perhaps take me a week or perhaps longer by way of interrogatories—I would like to get rid of them because I find they are never very satisfactory.

Mr. Mac Leod: What you are really dictating here is dictating interrogatories.

Mr. Kelso: No, I am trying to comply first with your suggestion to get the scope of my investigation.

Mr. Mac Leod: That is right.

Mr. Kelso: And when we come to the architect, I want to be fair to counsel who could know about it because I want to give him something about what I would want to say to the architect.

I think that that can be answered shortly by this: That I would want to ask the architect about this matter of controversey here the same questions that any lawyer about this board on the other side would want to ask if they were sitting in my chair.

I do not think I am enlightening anybody when I say in one word that I want to inquire about the physical layout as made by the architect.

Mr. Mac Leod: That is correct; that is what these questions indicate. You want to find out what we call the project plan, as much of that as we can disclose we are willing to. I am just thinking about the supplying of that.

[fol. 480] Mr. Kelso: Yes—

Mr. Mac Leod: I mean, in the most efficient and rapid manner.

Mr. Kelso: There is nobody that wants to do that more than myself. However, I am not one that wants to be confronted with the statement, namely, that you had the opportunity to tell them what you wanted and that you did not do it.

Mr. Mac Leod: Yes. I want to get it in the most rapid manner, however.

Mr. Kelso: I am saying to you now that I am willing to excuse Mr. Witman, and Mr. McNerney, and everybody else and sit down with your general counsel, or with you, or with Mr. Hasson, or anybody who wants to sit down and work out this if we can, and see if we can get to a stipulation.

Mr. Mac Leod: We have covered considerable ground in the short time. How much longer do you think it would take to go along with this to a conclusion? I am thinking of just what your line of inquiry would be.

Mr. Kelso: Well, I am going to ask the architect to go into the Bartholomew plan,—you are familiar with that [cecause] I brought it to your attention.

I wanted Mr. Tucker to confer with Mr. Bartholomew and Mr. Reynolds thought that he had conferred with Mr. [fol. 481] Bartholomew when I was talking to him, and dis-

covered Mr. Bartholomew was out, as I would like to discuss with him the order—or rather I would like to discuss with him whether they had familiarized themselves, and what his comment on it was.

Mr. Mac Leod: Mr. Kelso, I wish you would indicate how long you think it will take you to outline here what the scope of your questions would be as to the other witnesses, please.

Mr. Kelso: Well, in all of my practice, I have had men, from time to time, make an announceent that "We will be through in 30 minutes" and we would stay there for three or four days.

Mr. Mac Leod: That is not my point. I am not trying to bind you to anything. I am just asking for an indication as to how long it would take. We are making progress on it, as I said before. I do not want to interfere with you, and I do not want to be unfair to you, but I would like to ask how long it will take, because if it is going to take some time, I would like to adjourn to some other place and let Mr. Witman go back to work.

Mr. Kelso: I think that is a good idea, because to me this is neither interesting to Mr. Witman, or to these other gentlemen here except the witness who is going to be called on to answer anything. And as I understand it up to this point counsel have decided that these gentlemen do [fol. 482] not have to answer any of my questions.

Mr. Mac Leod: You have no idea how long it will take you to outline the scope of your inquiry?

Mr. Kelso: No, I do not, because I [did] no idea of going over this in this way, and I would have to go through it and pick it out.

Now, for instance, let me just take a minute here.

I wanted to take up these other matters. In fact, on November 19, 1940, Mr. Witman, I appeared before your Joint Committee in connection with this site, and I would now want to go into the matters that I went into at that time.

Mr. MacLeod: But how long do you think it would take? State what they were, Mr. Kelso.

Mr. Kelso: First, title to the court house park site.

Second, importance of considering the Cape Girardeau plan prepared by Harlan Bartholomew.

Now, I have outlined it here.

Mr. Mac Leod: I know, but the scope of your inquiry would be what, when you say the consideration?

Mr. Witman: Is that a copy of the document that you left with the committee at that time?

Mr. Kelso: I would say yes, although that is my office copy, and I would say by that that you had a copy of it, because that is what I had when I was here.

[fol. 483] Mr. Witman: I recall that you left something with us.

Mr. Kelso: I left it with you. And I left the protests, and all of that.

Will you indulge me this far to say that I think furnishing you with any additional matter without encumbering the record or unduly taking the time of these gentlemen, or going into this matter further with you could not be done at this time.

I only gave you this, and it is certainly not a very elaborate sort of thing today.

Mr. Mac Leod: That is just why I suggested written interrogatories. You can do that.

Mr. Kelso: We can stipulate on some of the facts, I trust, and if these do not want to testify; these gentlemen do not want to testify that is something else.

Mr. Mac Leod: But at the present time our problem is about the scope of your line of inquiry with other witnesses; at the present time you may have other questions. I am not trying to pin you down.

Mr. Kelso: No. At the present time I have asked for the opportunity to go into the matter of the scope of my inquiry with counsel before closing the door as to what it is. That is what I want. I would rather try to expedite the matter by limiting it as far as possible, but I want [fol. 484] those things.

Mr. Mac Leod: Perfectly all right.

Let the record show that we agreed to that. I will say this, Mr. Kelso, that all of these questions that you have asked, except with respect, possibly, to the project plan, or the plan for the development of the [porject]—

Mr. Kelso: Let me interrupt you—

Mr. Mac Leod: Yes.

Mr. Kelso: I would want the opportunity to have a copy of the contract for examination that has been entered into between the city officials and the Government for the proposed exchange of the properties.

Mr. Mac Leod: You want a copy of that?

Mr. Kelso: I do not care, but I just want to see whether I want to examine on it. I would like to have a copy. I think it is a public document.

Mr. Mac Leod: I am just wondering why you do not have it.

Mr. Hasson: Don't the city officials have it there?

Mr. Mac Leod: Wouldn't a proper proceeding be to subpoena it?

Mr. Kelso: Let's avoid personalities and try to stick just to the cold facts.

Mr. Mac Leod: You try your case as you want to, of [fol. 485] course.

Mr. Kelso: The contract should be with the Clerk of the City.

When I am asking for this I am not asking for any secret thing.

When I asked for it down there at Cape Girardeau "Surely", the Secretary said.

The City Clerk, then said the lawyer had it and had taken it out.

I was unable to obtain it.

Mr. Mac Leod: I think this, Mr. Kelso, that almost all of the matters called for, or that you have indicated you

want to ask, except possibly with respect to the development of the project by the Government, and except possibly with respect to this contract, would all be answered and the information would be disclosed in this statement of facts.

Mr. Kelso: For instance, here I want—here I want—

Mr. Mac Leod: Maybe much more besides. Maybe much more.

Mr. Kelso: I would want the architect's estimate or statement of estimated [cos] made by the Government of the proposed improvements to the grounds in the way of [fol. 486] driveways around the property, and walks to get to the property.

Mr. Mac Leod: The only thing we can give you in that respect, I am not saying this definitely, ordinarily that information and the only information we can give on that would be just the amount allocated to that project, the contracts have not yet been entered into on that as yet, you know.

Mr. Kelso: Yes. The architect announced publicly down in Cape Girardeau, as I got it, that he was going to make an effort to estimate what it would cost and show a plat of what they proposed to do with the roads and highways, and so forth, streets and improvements there, because the issue had been raised as to how much money they were going to spend of the $430,000 on changing the face of the park.

Mr. McNerty: Are we through?

Mr. Mac Leod: We will tell you all we can about that. Now, about the interrogatories—

Mr. Kelso: I think that is a very relevant inquiry.

Mr. Hasson: Are we concluded? Do you want to—

Mr. Kelso: I have never agreed to make any written interrogatories.

Mr. Mac Leod: If you have any further questions, and if you want to make any further inquiry, then you do so, Mr. Kelso.

[fol. 487] Mr. Kelso: I will do so.

I will make an offer now, again: I said I would like to meet with the General Counsel of the Administrator, or with Mr. McNerney, or with Mr. MacLeod, or with Mr. Hasson, or either of them, or other attorneys of the Department of Justice as soon as we can, after I had had a little chance to go through my papers and then try to as concisely as [possibely] could be done state what if any other things that we would like to have incorporated, and if I understand, that was entirely satisfactory to counsel.

Mr. Mac Leod: It is. Now, at the present time, I do not think there is anything further we can do until after we have prepared the statement of facts.

Mr. Kelso: That is right.

Mr. Mac Leod: Which we will prepare.

Mr. Kelso: The statement of facts is merely a matter of information to show how far we can agree on it.

Mr. Mac Leod: We are going to offer it. We are willing to stipulate as to that statement of facts. If you do not want to stipulate all right. We are making the offer and if you want it, all right.

Mr. Kelso: If I can agree to it I will agree to it, if I can not, I can not.

Mr. Mac Leod: If you want to inquire further and beyond that statement of facts by other written interrog-
[fol. 488] atories or indicating the scope of your inquiry, we are willing to go ahead.

So, at the present time I do not think there is much we can do until we have that statement of facts.

Mr. Witman: Will that also include any further information from me?

Mr. Mac Leod: Yes.

Mr. Witman: It will not be necessary for me to go any further with that?

Mr. Mac Leod: No.

Now, there is one thought that occurs to me, and, of course, that has nothing to do with the record here, but the reporter has the statements of your questions and indication of your line of inquiry.

I suppose we should get a transcript of this hearing today for our own use.

Mr. Witman: That would be quite necessary.

Mr. Kelso: He will be glad to cooperate with you in any way possible, I am sure.

Shall we arjourn until tomorrow at two o'clock?

If we can not proceed then, we can take the matter up further.

Mr. Mac Leod: Yes. Suppose we do that.

Whereupon, the taking of depositions in the above [fol. 489] entitled matter was thereupon duly adjourned to re-convene at two o'clock p. m. in Room 6324, Federal Works Building, Washington, D. C., November 4, 1943.)

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D. 1943.

(Seal)

MARGARET C. SCOFIELD,
Notary Public.

My commission expires Aug. 31, A. D. 1948.

[fol. 490]

Washington, D. C.,
November 4, 1943.

By agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause and the Attorney appearing for Iska W. Carmack, one of the Defendants in the above entitled cause, the taking of the Depositions at 2:00 o'clock in the afternoon, November 4, 1943, at Room 6324 Federal Works Building, Washington, D. C., was adjourned until tomorrow, November 5, 1943, at 2:00 o'clock in the afternoon of that day.

Whereupon the said attorneys appearing for the said parties as aforesaid directed the Reporter to let the record show that, by agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause, and the attorney appearing for Iska W. Carmack, one of the defendants in the above entitled cause, the taking of depositions in the above entitled cause was duly adjourned to reconvene at 2:00 o'clock P. M. in Room 6324 Federal Works Building, Washington, D. C., November 4, 1943.

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D. 1943.

(Seal) MARGARET C. SCOFIELD,
Notary Public.

My commission expires Aug. 31, A. D. 1948.

[fol. 491]

Washington, D. C.
November 5, 1943.

By agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause and the Attorney appearing for Iska W. Carmack, one of the Defendants in the above entitled cause, the taking of the Depositions at 2:00 o'clock in the afternoon, November 5, 1943, at Room 6324 Federal Works Building, Washington, D. C., was adjourned until tomorrow, November 6, 1943, at 2:00 o'clock in the afternoon of that day.

Whereupon the said attorneys appearing for the said parties as aforesaid directed the Reporter to let the record show that, by agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause, and the attorneys appearing for Iska W. Carmack, one of the defendants in the above entitled

cause, the taking of depositions in the above entitled cause was duly adjourned to reconvene at 2:00 o'clock P. M. in Room 6324 Federal Works Building, Washington, D. C., November 6, 1943.

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D. 1943.

(Seal)

MARGARET C. SCOFIELD,
Notary Public.

My commission expires Aug. 31, A. D. 1948.

[fol. 492]

Washington, D. C.,
Saturday, November 6, 1943.

By agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause and the Attorney appearing for Iska W. Carmack, one of the Defendants in the above entitled cause, the taking of the depositions at 2:00 o'clock in the afternoon, November 6, 1943, at Room 6324 Federal Works Building, Washington, D. C., was adjourned—November 7, 1943 being a Sunday—until Monday, November 8, 1943, at 2:00 o'clock in the afternoon of that day.

Whereupon the said attorneys appearing for the said parties as aforesaid directed the Reporter to let the record show that, by agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause, and the attorney appearing for Iska W. Carmack, one of the defendants in the above entitled cause, the taking of depositions in the above entitled cause was duly adjourned to reconvene at 2:00 o'clock P. M. in Room 6324 Federal Works Building, Washington, D. C., Monday, November 8, 1943.

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D. 1943.

(Seal)

MARGARET C. SCOFIELD,
Notary Public.

My commission expires Aug. 31, A. D. 1948.

[fol. 493] Monday, November 8, 1943.

By agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause and the Attorney appearing for Iska W. Carmack, one of the Defendants in the above entitled cause, the taking of the Depositions at 2:00 o'clock in the afternoon, November 8, 1943, at Room 6324 Federal Works Building, Washington, D. C., was adjourned until tomorrow, November 9, 1943, at 2:00 o'clock in the afternoon of that day.

Whereupon the said attorneys appearing for the said parties as aforesaid directed the Reporter to let the record show that, by agreement by and between the attorneys appearing for the United States of America, Plaintiff in the above entitled cause, and the attorney appearing for Iska W. Carmack, one of the defendants in the above entitled cause, the taking of depositions in the above entitled cause was duly adjourned to reconvene at 2:00 o'clock P. M. in Room 6324 Federal Works Building, Washington, D. C., November 9, 1943.

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D. 1943.

(Seal) MARGARET C. SCOFIELD,
Notary Public.

My commission expires Aug. 31, A. D. 1948.

[fol. 494] November 9, 1943.

By agreement of the parties the taking of the depositions was resumed at 2:00 o'clock p. m. November 9, 1943 at room 6324 Federal Works Building, Washington, D. C. pursuant to adjournment.

Whereupon, in room 6324 Federal Works Building, (formerly Old Department of Interior Building) Washington, D. C., beginning at 2:00 o'clock p. m. the following proceedings were had, to-wit:

By agreement the taking of depositions was further recessed until 3:30 o'clock p. m. of the same day, whereupon the following proceedings were had:

Mr. Kelso: I suggest that the record show the appearances as they are now, and that the taking of the depositions was recessed from 2 o'clock p. m. of this same day until now, 3:30 p. m., by agreement of the parties. Is that correct?

Mr. Hasson: Yes.

Mr. Mc Nerney: That is correct. Let the record show Harry J. McNerney, Special Assistant to the General Counsel, Federal Works Agency, appearing for the Agency.

Mr. Hasson: B. J. Hasson, counsel, for the Department of Justice.

Mr. Mc Cabe: J. F. McCabe, attorney, Federal Works Agency.

[fol. 495] Mr. Betterley: J. F. Betterley, Post Office Department.

Mr. Kelso: And let the record show Mr. Witman present; is that correct?

Mr. Witman: Yes. E. R. Witman, Federal Works Agency, you have my title already in the record.

Mr. Kelso: Stipulation between the plaintiff, United States of America, and the defendant, Iska W. Carmack, regarding an agreed statement of facts to be read in evidence on the part of the defendant, Iska W. Carmack, in the above entitled cause. Mr. Reporter, I am handing you a copy of this stipulation so that counsel for the Government may go over with the counsel for the defendant, Iska W. Carmack, at this time, and you can note in the copy furnished you the changes to be made in the stipulation at this time, and for that purpose I am asking Mr. McNerney to call attention to the changes which he has noted as changes agreed upon to be made in the original copy of

the stipulation handed to the Reporter. These should be made upon the record, so the record will be clear. Is that agreeable to you, Mr. McNerney?

Mr. McNerney: Perfectly. I have noted on this copy the corrections to be made, and the reporter may simply follow them. With exception of the reference to the statutes it is satisfactory. That latter will be subject to check and if found to be correct it may go in later. For [fol. 496] instance, page one is O. K. And following on through you will note these various paragraphs to be stricken, or changed as is noted thereon. Let it be retyped as changed and submit it tomorrow and we will go over it for the purpose of signature. You can just send it over to my office in the morning.

Mr. Hasson: What is next?

Mr. Kelso: I suggest that this be spread on the record as an indication of what has occurred.

Mr. Mc Nerney: That may be done, but I would suggest spreading on this record the stipulation after it has been completed and executed tomorrow. The reporter can do that.

Mr. Hasson: Will that close this up?

Mr. Kelso: I want to finish up one thing at a time. I think that would be better.

Mr. Hasson: I do not follow you as to your point there?

Mr. Mc Nerney: He is asking about what you are going to do as to that?

Mr. Hasson: You can either put it in there or if you wish you can put it in separately and file it as a part of the depositions; we can file it as an exhibit.

Mr. Witman: Who is to sign it?

Mr. Hasson: I am to for the Department, I suppose.

[fol. 497] Mr. McNerney: I do not know whether I will sign [ir] or whether Mr. Johnson, or the Commissioner of Federal Works.

Mr. Witman: You will sign it with the corrections made?

Mr. McNerney: It will be re-copied with the changes which I have indicated are to be made thereon.

Mr. Kelso: Then let it be shown that it is agreed that the reporter shall copy into the and spread upon the record the stipulation as agreed upon between counsel, and that he is to prepare the same for signature.

Mr. Hasson: He can attach copies of it.

Mr. Kelso: Copies as corrected which are to be signed by the attorneys representing the Department of Justice and by the attorneys representing the Federal Works Agency; is that correct as to the latter?

Mr. McNerney: For the Federal Works Agency, and by you?

Mr. Kelso: And by I. R. Kelso.

Mr. Hasson, you will sign for the Department of Justice?

Mr. Hasson: Yes.

Mr. Kelso: Anybody else?

Mr. Hasson: I don't know.

Mr. Kelso: But you will sign for the Department of [fol. 498] Justice?

Mr. Hasson: Yes.

Mr. Kelso: Let the record show that the signed copy of the stipulation shall be delivered to the reporter and transmitted to the Court as a part of the record in this case. Then, we won't take any advantage of you.

The reporter will have this corrected copy by in the morning all prepared for signature. Let me ask you where will we get your signatures?

Mr. Mc Nerney: I do not know whether Mr. Johnston will have the time to do it, or whether I will sign it. I would have to explain it all to him if he signed it, and it would take some time.

Mr. Kelso: You will look after that?

Mr. McNerney: Yes, for the Department.

Mr. Kelso: The copy to be signed by the Federal Works Administration will be taken care of by Mr. McNerney, then?

Mr. McNerney: Yes.

Mr. Kelso: And the copy for the signature of the Department of Justice—of course it will be the same document—will be taken care of by Mr. Hasson?

Mr. Hasson: Yes.

Mr. Kelso: And I will sign it, and I will come—down to your office and sign it if desired.

[fol. 499] Mr. McNerney: All right. I suggest that it be spread on the record tomorrow after it has been signed. There may be a few slight changes then, and it will appear in its final form.

Mr. Kelso: Very well.

I now ask Mr. Witman if he is ready, willing and prepared to proceed with his deposition?

Mr. Witman: If there is no objection by counsel we can proceed with that now.

Mr. Hasson: Go ahead.

Mr. McNerney: All right.

E. R. Witman thereupon resumed the giving of his deposition in the above-entitled matter, and, to questions to him then propounded deposed and answered as follows:

Direct Examination (Continued.)

By Mr. Kelso:

Q. This is Mr. E. R. Witman?

A. Yes. E. R. Witman, Fiscal Manager, F. W. A.

Q. And you are the same E. R. Witman whose deposition we began several days ago and then recessed pending the obtaining of certain information?

A. Yes.

Q. Now, then, Mr. Witman, I think that the stipulation which has been gone over here, and put into the record will [fol. 500] take care of most of the matters that I wanted to inquire about. Just to formally let the gentlemen make their record I am going to ask you a few questions here.

A. Yes.

Q. You stated that you were the custodian of the files and records relating to the condemnation of the site at Cape Girardeau, Missouri, in your deposition the other day; is that correct?

A. I think I should qualify that somewhat.

Q. In what way?

A. I think I should qualify that somewhat. I am the custodian of the records relating to the examination of, construction of, and—no, that is not the word—examination of, consideration of, and selection of the site.

The legal documents are in the custody of the General Counsel's office.

Q. You have in your custody the report and recommendations made by M. J. Deutsch, Site Inspector?

A. That is correct.

Q. Will you produce this report at this time for the inspection of counsel for the defendant Iska W. Carmack, and identify the same so that it may be used as a record in this case on the trial of it?

A. The Site Agent's reports are considered confidential documents of the agency. I am, therefore, not at [fol. 501] liberty to produce the document at this time.

Q. Well, now, is that same statement—just to briefly go along—is that same statement true with reference to your Architect's report?

A. That would be true of that report also.

Q. Would that be true with respect to your report of Mr. Roome, the Liaison Agent? A. Yes.

Q. Then, you are not prepared to deliver and will not furnish at this time the reports of Mr. Deutsch, Mr. Tucker, Mr. Roome, or copies thereof, for the reasons already stated by you?

A. Quite correct.

Q. You did prepare a chronological index of the proceedings had by your committee known as the Joint Committee considering the Selection of a Site at Cape Gir-

ardeau, Missouri, for the use of counsel immediately following the adjournment of the taking of your deposition on November 3, 1943?

A. I did.

Q. Do you object to the use of that memoranda in evidence, that is, its introduction and use in evidence by counsel for the defendant, Iska W. Carmack, should it become necessary to offer any reference to it, on the trial of the above-entitled cause?

A. I—

Mr. Hasson: I object to that, Mr. Kelso. It was handed [fol. 502] to you with the express purpose of being informal and not exactly correct, perhaps.

Mr. Kelso: But, undoubtedly, the dates given there are correct?

Mr. Mc Nerney: I would like to add to Mr. Hasson's statement that that memoranda was prepared as a basis to getting together with counsel for the defendant in an effort to agree upon a stipulation of facts. The record shows such a stipulation has been agreed to.

Mr. Hasson: Tentatively.

Mr. Kelso: Well, have we or have we not agreed upon a stipulation? Am I now again being informed that there is no stipulation?

Mr. Hasson: We have not signed it yet.

Mr. McNerney: What he means is we have to check the statutory references.

Mr. Hasson: And sign it.

Mr. Kelso: Now, gentlemen, you are trying simply to put in the record the only thing, in fact, I wanted to show; that there is nothing in any statement furnished to me by Mr. Witman since his last examination that is intended in any way to be used as evidence on the trial of this cause? That is what you have just said.

Mr. Hasson: Mr. Kelso, we have given you all of the facts that we possibly can in that stipulation of facts and [fol. 503] to add this to it just makes the record voluminous. Can you not refer to that in asking questions of any of the witnesses of which you intend to take the deposition?

Mr. Kelso: The thing you wanted was, gentlemen, that I accepted this document with the distinct understanding that it was not intended for anything except to be used by me, and it was not intended to be used by anybody except me, and that if I took it under any other arrangement it would not be delivered; but it was intended only for use in preparing the stipulation.

I think the record will show that.

Mr. Hasson: You now ask Mr. Witman if he objects to its use in court.

Mr. Mc Nerney: That is right.

Mr. Kelso: It is his document.

Mr. Mc Nerney: That is correct, but you are asking Mr. Witman, who was not a party to the agreement we had with you respecting the memorandum.

Mr. Kelso: All right. Now, with counsels' statement regarding the matter of the agreement or the understanding between counsel relative to the statement prepared by Mr. Witman, or his department, I am entirely satisfied.

I wanted the record to show that I was not concealing anything, no information, and to let the record show that it was used in the preparation of the memorandum. I have [fol. 504] done the best I can, and that is all.

By Mr. Kelso:

Q. Mr. Witman, do you know whether it would be possible to ask Mr. Reynolds any questions without interfering or inconveniencing him in any way by agreeing on some particular hour or time?

A. I would rather have counsel arrange that with the Commissioner.

Q. That is right. Mr. Emmert was going to do this. All right. Now, then, that would be true of any other witness like General Fleming or the Postmaster General?

A. Yes, sir.

Q. I hope that it may not be necessary, but I do not want to close the [took] to asking them any questions that might seem necessary, and with that understanding I think it will be entirely agreeable to me to adjourn this hearing until we have completed the stipulation and gotten it into

the record, and know that we have disposed of all of the matters that I wanted to dispose of, Mr. Witman. If there should be anything happen to cause counsel to change their mind about the stipulation, why, then I would, of course, want to ask you about all these things in here, but I do not see any trouble about that.

A. I do not think there will be any trouble about that.

Mr. Kelso: I have no further questions for this witness.

[fol. 505] Mr. Hasson: I would like to ask Mr. Witman a few questions.

Cross Examination.

By Mr. Hasson:

Q. Mr. Witman, the other day you testified that you served with the Joint Committee?

A. Yes, sir.

Q. Did you mean that you served in an advisory capacity on it?

A. In an advisory capacity.

Q. Did you attend the meetings of this committee at the Cape Girardeau hearings? All meetings?

A. To the best of my recollection I was present at all of them.

Q. But there may have been some meetings that you did not attend?

A. Yes.

Q. Now, Mr. Witman, how long have you been with the Public Buildings Administration?

A. With the Public Buildings Administration and its predecessor since—how long Mac?—since 1927.

Q. All in the acquisition of lands for Government projects, was it?

A. In that capacity, in the acquisition to a large extent [fol. 506]—that is, I have served all of that time, however, with the Joint Committee, but not all of that time in the acquisition of lands, but a large part of the time.

Q. Regarding the report of the Site Agent, M. J. Deutsch, do you have any objection to reading the recommendation from his report, the full recommendation regarding the acquisition of the present site, or is it relative to the 21 other parcels up there, that is, at Cape Girardeau?

A. I believe that that is a question which the Commissioner of Public Buildings, who is a member of the said Site Committee should answer.

Mr. Hasson: All right. That is all.

Mr. Kelso: Mr. McNerney, do you want to ask him anything?

Mr. McNerney: Yes.

By Mr. McNerney:

Q. Mr. Witman, were you questioned at the previous hearing as to whether or [illegible] committee gave consideration to a protest [illegible] of Cape Girardeau forwarded by a lawyer [illegible] name of Mr. Sample?

Mr. Kelso: Wait a minute. I want the record to show that counsel for defendant, Iska W. Carmack, objects to that question on the ground that it is not competent for any purpose, and particularly the witness should not be permitted to discuss anything that might be regarded as a [fol. 507] conclusion or as an opinion as to what was done.

The record, [according] to the witness' testimony was duly made, and the hearings were recorded. And the record is in his custody, and the best evidence and the only evidence thus far that could be properly admitted would be the records referred to.

Mr. Hasson: Well, with reference to [the] that I will ask this question:

By Mr. Hasson:

Q. Mr. Witman, with reference to the petition protesting the acquisition do you have any knowledge of an official election or referendum by the citizens of Cape Girardeau?

Mr. Kelso: Counsel for defendant, Iska W. Carmack objects to that question for the reason that the pleadings show that the right to hold an election is an issue on the trial of this case as to whether or not any election was ever held.

The facts show in the hearing and in the record before the counsel that the Ordinances passed relative to this matter were subject to a referendum under the terms of the statutes of the State of Missouri.

The record shows that many [timesd] the required number of signers to a referendum petition was furnished and filed with the City, and that the statute was not complied with, and no referendum was had, and no steps were ever [fol. 508] taken to hold an election as [contemplaed] in the request by citizens of Cape Girardeau protesting against the use of the site, and that none was ever filed with this body.

And we have the question of the resolutions—if he wants to offer them in evidence they are here, but it is wholly improper for the witness to undertake to testify as to what the resolutions showed, or as to the validity of the resolutions, or as to any facts regarding the election, all of which is a matter of fact to be passed upon with the facts themselves.

I would not have any objection to the record, as made, being offered in evidence, but I would object at this time to the receiving in evidence of those resolutions because they were not in conformity with the statute, and contrary to, and in violation with all decisions of our Courts with reference to the holding of elections and with reference to the referendums and to the matter of petitions.

Mr. Hasson: Mr. Kelso, that matter can be determined by the Court. I will change my question and ask Mr. Witman—

By Mr. Hasson:

Q. Mr. Witman, do you know whether or not the Joint Committee considered what was purported to be the official record of a referendum on the question of the acquisition of the present site for a Federal building?

[fol. 509] Mr. Kelso: Now, I object to any isolated item that may appear in the record; as counsel for the defendant, Iska W. Carmack, I have asked for the record repeatedly since the beginning, and I have asked for the opportunity to inspect, and I have never agreed to leave out the records and stipulate as to such testimony, but I have stipulated.

Now, I would not want counsel for the Government to come in after I had stipulated to the extent that I have and undertake to make out a case by permitting the witness

to testify as to what is in some un-disclosed record of the [porceedings.] I insist that that is wholly incompetent, irrelevant, improper and should not be considered.

Mr. Hasson: Mr. Kelso, do you mean that you were unable to procure the records?

Mr. Kelso: I have been unable to get it to this very point.

Mr. Hasson: You mean you have not inspected the record from this department in Washington. Have you asked for it? You said you had not gotten it.

Mr. Kelso: I said I had not gotten it. May be I have not asked the witness for it.

May I ask Mr. Witman this:

By Mr. Kelso:

Q. Mr. Witman, I want to be sure I understand you as to the records. Didn't you say that you made records of [fol. 510] everything that transpired in connection with the consideration of the pertinent facts necessary to be taken into consideration in the selection of the site at Cape Girardeau for the post office, custom house, and Federal Court building?

A. As I recall, you asked me if I had custody of certain reports of the Site Agent, and you asked the same question as to the Architect, and as to the Liaison Officer.

Q. I am now asking, because I thought I asked you the other day, did you make records of the proceedings had by the Joint Committee in the matter of considering the pertinent facts necessary in connection with the selection of a site at Cape Girardeau for the Post Office, Custom House, and Federal Court Building?

A. There is no detail record kept of those meetings.

Q. What did you keep in the record? What did you make in the way of a record?

A. The records contain all papers, documents, reports, which are pertinent to the case.

Q. Now, tell me what you mean, Mr. Witman, by not making any record of the proceedings other than the fact of the filing of the papers?

A. I mean by that we did not take a stenographic report of those meetings.

Q. You did not make any record of any proceedings had at any of those meetings other than the record of the [fol. 511] documents? Of the documents filed?

A. There are records of the meetings kept as to who attended but no detailed record of the transactions.

Q. Now, did you have anyone who was a shorthand reporter that attended those meetings?

A. No.

Q. Did you have anyone that made any record of them?

A. As I say we kept a list of those who attended.

Q. I mean, of the proceedings.

A. Not of the proceedings.

Q. Anything that you might testify to now would be entirely a matter of recollection of what transpired in 1940 in the conference?

A. That would be true.

Mr. Hasson: Mr. Witman—

Mr. McNerney: I think right before that that I would like to ask him, in response to the Judge's last question this question:

By Mr. McNerney:

Q. Would it not be based on your recollection as to what transpired in 1940 plus your recent review of the documents in the file?

A. Of course.

Q. It would?

A. Yes. It would.

[fol. 512] By Mr. Hasson:

Q. Now, in view of the fact that counsel for the defendant put into the record the matter of the protests of the citizens I shall insist on Mr. Witman answering my former question as to whether or not the Joint Committee had before it for consideration the official record purporting to be a referendum held by the city of Cape Girardeau, Missouri, regarding the acquisition of the present site?

Mr. Kelso: Wait a minute. I object.

Mr. Hasson: The Court can rule on that.

Mr. Kelso: We object. The protest of the 667 citizens was furnished to counsel as information in the prepara-

tion of the stipulation which has been filed and spread on the records in this case. Now, then, if there are any other papers with respect to protests or petitions in favor of, and the witness desires to produce the papers so we can in an orderly way know, that is one thing.

Mr. Hasson: I am asking the witness a question as to whether or not certain things occurred and whether or not certain facts were known to him. I think he can answer that. It does not call for any files for an answer. The Court can rule on it.

Mr. Kelso: You are saying the Court can rule. The only way I can get the Court to rule on my objection is to state it.

[fol. 513] Mr. Hasson: The official record is in Cape Girardeau and is available to the public. I asked him whether or not the Joint Committee considered any such paper considered to be an official vote.

Mr. Kelso: All right. I must say I object to this witness testifying to that.

Mr. Hasson: How could that possibly be objectionable?

Mr. Kelso: As to what he considered, I object to this witness testifying as to what he considered a legal vote.

Mr. Hasson: I said "purported to be."

Mr. Kelso: What he considered.

Mr. Hasson: Not what he considered, that is a matter of opinion, but as to what purported to be an official document. Let the question be read to the witness.

(The question was read to the witness as follows):

"Q. Now, in view of the fact that counsel for the defendant put into the record the matter of the protests of the citizens I shall insist on Mr. Witman answering my former question as to whether or not the Joint Committee had before it for consideration the official record purporting to be a referendum held by the city of Cape Girardeau, Missouri, regarding the acquisition of the present site?"

[fol. 514] A. The Committee gave consideration to what appeared to it to be a vote of 1612 to 1344 approving Or-

dinances 905 and 906 which authorized the city to consummate the exchange of properties.

Mr. Mc Nerney: By those properties are you referring to the—

Mr. Hasson: Present site.

Mr. McNerney: Present post office building and site, and the site involved in the condemnation action?

By Mr. Hasson:

Q. Did the result purport to be in favor of the acquisition or against the acquisition?

A. In favor of the acquisition of the City site.

By Mr. McNerney:

Q. Do you know whether or not final action on the selection of this site was not deferred pending the outcome of the election to which you have just referred?

Mr. Kelso: Just not to encumber the record at all with unnecessary repetition, but I want to let the record show that I make the same objection Mr. McNerney to his answering that question that I have to the former questions.

Mr. Mc Nerney: That is quite all right. I just want to call attention to the fact that you have in your examination of Mr. Witman made references in your questions as to what considerations the Committee gave with respect to protests.

[fol. 515] We are simply showing that in addition to those protests the Committee gave consideration to favorable recommendations of the citizenry of Cape Girardeau.

By Mr. McNerney:

Q. I do not believe you have answered my queestion.

A. No, I have not. I am recalling. (Pause.) I am sure that the Joint Committee took into full consideration, before making its acceptance, the vote by the City.

By Mr. Hasson:

Q. Mr. Witman, do you mean the recommendation for acceptance?

A. True, the recommendation for acceptance.

Mr. Hasson: We have to be a little technical about it. That is all.

Redirect Examination.

By Mr. Kelso:

Q. As I understand your testimony, you treated--

Mr. Hasson: Mr. Kelso, is this re-direct; is that the idea?

Mr. Kelso: I hope so.

By Mr. Kelso:

Q. As I understand your testimony, you treat the—or you treated the election referred to by you in answer to questions propounded by counsel for the plaintiff, as a properly called, legally held election, and in considering it you predicated the report you made on it as being a [fol. 516] legally called and properly held election?

Mr. Hasson: I object to the form of the question, as well as to the question being put to Mr. Witman, as he is not a Member of the Committee, but served with them in an advisory capacity, so, what the Committee considered, Mr. Witman could only guess.

A. Again, that is a question which I would rather have a Member of the Committee answer.

Mr. Kelso: That satisfies me. I just wanted to get a record of it here.

By Mr. Kelso:

Q. Now, Mr. Witman, I am not clear, and I do not want to prolong it, but I want to get it clear; that is the point. A. Yes?

Q. Counsel for the Government tried to make some point of the acceptance of that Committee. Let's get the workings of that Joint Committee, because you can give it in a minute.

A. What is the question you have in mind?

Q. First, you were not a member of that Joint Committee, were you? A. No.

Q. And you sat with them merely in an advisory capacity? A. That is right.

Q. And the recommendations, if any, made by the Joint Committee would be made and were made by whom?

[fol. 517] A. The Commissioner of Public Buildings and the Fourth Assistant Postmaster General.

Q. So that whatever was considered by that Joint Committee, or whatever decisions were made by that Joint Committee were made by the persons named other than yourself? A. Yes.

Q. Who else on that Committee acted in an advisory capacity? A. Mr. Betterley.

Q. What is his position?

A. I think he is the Chief of the Post Office Quarters of the Post Office Department. Let me look at this book to refresh my recollection.

Q. Yes, get your Congressionad Directory?

A. I will have to go back to that Directory, since we are going on record.

Q. That is right, I had to do it.

A. I want to get them correctly.

Q. I am glad to see you fellows do it, I had to do it too, and of course, I am not a resident of Washington.

A. I will find it in here.

Mr. Mc Nerney: Yes.

Mr. Mc Cabe: Superintendent, Division of Post Office Quarters.

A. Superintendent, Division of Post Office Quarters it [fol. 518] says here. That is right. I just checked it.

Q. Mr. Betterley?

A. Yes. That is right.

Q. What are his initials?

A. His initials are J. F.

Q. They are J. F.?

A. That is right.

Q. Mr. Betterley has been present during all of the examinations had in the taking of these depositions has he not, Mr. Witman?

A. As I recall he was here most of the time.

Mr. McCabe: Most of the time.

By Mr. Kelso:

Q. Mr. Betterley has made a record of the notes that transpired and the testimony that has been taken in the different examinations that we have had during the progress of the taking of the depositions, has he not?

A. I do not know whether he has or not.

Mr. Hanson: I object. Ask Mr. Betterley about that.

By Mr. Kelso:

Q. Do you know whether he has or not? A. No.

Q. What I am trying to get at is whether he acted in that capacity, namely, as reporter for that Committee at [fol. 519] any time in the making of the report or record?

A. No.

Q. He did not do that? A. No.

Q. Would he or would he not make any record for your Committee? A. No.

Q. I was afraid to ask that, I was afraid it would not be agreeable. A. All right.

Q. Now, Mr. Witman, so far as I know, I think that is all. Yes. That is all. A. Thank you.

And Further Deponent Saith Not.

Let it be remembered that the signature of the witness hereunto, and the oath of the witness have each been waived by both parties, the testimony of the witness to have the same force, effect, and weight as if said oath had been taken, and as if the witness had hereunto affixed his seal and subscribed his hand.

The above and foregoing is a true transcript of the questions asked and answers given by the said parties as hereinabove set forth.

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D. 1943.

(Seal) MARGARET C. SCOFIELD,
Notary Public.

My commission expires Aug. 31, 1948.

[fol. 520] Mr. Kelso: Now, Mr. Betterley has been kindly called into the room by Mr. McNerney. I do not want you for anything. I just wanted to know now whether you had—well I will ask you a few questions.

J. F. BETTERLEY was thereupon called as a witness to give depositions in the above entitled matter, and the oath and signature having been waived by both parties, deposed and, to questions asked him, deposed and answered as follows:

Direct Examination.

By Mr. Kelso:

Q. You are Mr. J. F. Betterley? A. Yes.

Q. Mr. Betterley, I wanted to know whether you had made any report of the transactions of the Joint Committee?

A. Why, I made notes for my information, and Mr. Meyer's information.

Q. What I was trying to get at, we are trying to show whether you were reporter for the committee?

A. No, I am not qualified as a reporter.

Q. And you made no record for the Committee.

A. That is right.

Q. That is all. I thought that may be you might be able to give me some information.

[fol. 521] And Further Deponent Saith Not.

Let it be remembered that the signature of the witness hereunto, and the oath of the witness have each been waived by both parties, the testimony of the witness to have the same force, effect, and weight as if said oath had been taken, and as if the witness had hereunto affixed his seal and subscribed his hand.

The above and foregoing is a true transcript of the questions asked and answers given by the said parties as hereinabove set forth.

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D. 1943.

(Seal) MARGARET C. SCOFIELD,
Notary Public.

My commission expires Aug. 31, 1948.

[fol. 522] Mr. Kelso: That is the best I can do, Mr. Witman. I hope I have not troubled you too much.

The Witness: I am glad to help.

Mr. Kelso: I am glad to hear that, and I certainly appreciate it.

Now, then the only thing I want to do is to leave it to you to try and arrange this next meeting, because it may take General Walker and possibly General Fleming to see who did recommend it.

Mr. McNerney: You want Mr. Hart, the Architect?

Mr. Kelso: Now, not now since I have cut this out, I will let Mr. Hart go.

Mr. Mc Nerney: I will tell you this: I just want to point out that Mr. Walther may not be able to give you the full information you are getting at, according to your statement. You mentioned that you wanted to get some distances from the outside wall of the proposed building to a certain point. I do not know that Mr. Walther would have that, I do not know that he has been furnished with the plans of the proposed building.

Mr. Kelso: I just decided when I struck that out of my memoranda that I would let the City Engineer of Cape Girardeau, Missouri, get the plans from the District Attorney and make a plat and describe it for me.

Mr. Hasson: I doubt if the District Attorney has the [fol. 523] building plans. He has the location of the building. The Architect would be the one who would have that.

Mr. Kelso: Then may be we had better ask him those questions.

Mr. Hasson: The Architect has those plans.

Mr. Kelso: I was just trying to save time in getting away, and your time too, but I will be very glad to do that if you think there are no plans down there.

Mr. Hasson: I am quite sure he does not have the plans showing the location of the building.

Mr. Kelso: Can we have him tomorrow afternoon, Mr. Witman?

Mr. Witman: These gentlemen would know more about that.

Mr. Mc Nerney: How about Commissioner Reynolds?

Mr. Kelso: I think there are one or two people I want.

Mr. Witman: I can not get hold of Mr. Hart.

Mr. Kelso: He might answer some of the questions I have to ask, otherwise, General Walker or General Fleming.

Mr. McNerney: Mr. Witman was just being careful in directing you to the Committee. You asked him about the recommendations.

Mr. Kelso: Mr. Reynolds would be all right. He is the Chairman?

[fol. 524] Mr. Mc Nerney: You want to ask him about the activities of the Committee in respect of the site?

Mr. Kelso: It might develop into that, but what I want to ask Mr. Reynolds is something about the method of procedure, and if possible ask him something about his telegram to Mr. Tucker, and whether Tucker reported anything to him, and just things of that kind that have been cut out of the stipulation.

Mr. Mc Nerney: We told you that Tucker said that he went in no other role than that indicated—

Mr. Kelso: You have in mind what I want to show and that is all. If you do not think he is the man, or if you know he did not do those things, we can dispense with him on your statement as counsel. I would not want to call anyone unnecessarily.

Mr. McNerney: I want to know how long you will need the Commissioner, because that is the first question he is going to ask.

Mr. Kelso: Personally, I would not think but a very few minutes.

Mr. McNerney: Do you want all of this conversation written up?

Mr. Kelso: I do not care.

Mr. Mc Nerney: It is your money.

[fol. 525] Mr. Kelso: A record is convenient at times.

Mr. Mc Nerney: About the Postmaster-General, will you tell me just what is your line of testimony there?

Mr. Kelso: Well, as they signed the thing, I will ask them upon what they acted when they signed.

Mr. Mc Nerney: How long will it take?

Mr. Kelso: That depends on how long it will take them to answer that. I should think it would be very brief indeed.

Mr. Mc Nerney: Do you think you will be finished with them in a half hour?

Mr. Kelso: Yes. I should think so, barring some unexpected contingency.

Mr. Mc Nerney: I think that is about the right time, myself.

Mr. Hasson: If you can get Mr. Reynolds and General Fleming at the same time, do you want that?

Mr. Mc Nerney: We will start out with Mr. Hart.

Mr. Kelso: Tomorrow at two o'clock?

Mr. Mc Nerney: Yes. In the meantime I am going to get in touch with Commissioner Reynolds and the General.

Mr. Witman: He can start in with Mr. Hart at two o'clock.

Mr. Mc Nerney: Will you take care of Mr. Walker?

Mr. Witman: We can start in with Mr. Hart and we can work the Commissioner in, if necessary breaking in on [fol. 526] Mr. Hart for a few minutes to get the Commissioner's questions and answers on the record.

Mr. Kelso: Any way you say.

Mr. Mc Nerney: We will adjourn until two p. m. tomorrow.

Mr. Kelso: That is satisfactory to me.

Mr. Mc Nerney: Two p. m. tomorrow at my office then, which is room 4121. We now stand adjourned until that time.

Whereupon the taking of depositions in the above-entitled matter was thereupon duly adjourned to reconvene at two o'clock p. m. in room 4121, Old Department of Interior Building, Washington, D. C., November 10, 1943.

JOSEPH M. HALL,
Reporter.

Sworn to and subscribed before me this 22nd day of November, A. D., 1943.

MARGARET C. SCOFIELD,
(Seal) Notary Public.

My commission expires the 31st day Aug. of 1948.

[fol. 527] Washington, D. C.,
November 10, 1943.

By agreement of the parties, the taking of the depositions at two o'clock, November 10, 1943, at room 4121, Federal Works Building, Washington, D. C., was resumed at that time and place,

Whereupon, in room 4121, (Old Department of Interior Building and/or Federal Works Building), Washington, D. C., beginning at two o'clock p. m. the following proceedings were had, to-wit:

Appearances:

B. J. Hasson, Esq., Department of Justice, appeared for the United States of America, Plaintiff in the above entitled cause.

I. R. Kelso, Esq., Attorney, with offices in the First National Bank at Cape Girardeau, Missouri, appeared as attorney for Iska W. Carmack, one of the defendants in the above entitled case.

Harry J. Mc Nerney, Esq., Attorney, appeared as counsel for the Federal Works Agency.

[fol. 528] Mr. Kelso: Suppose we begin by letting the record show that I appear here as attorney for Iska W. Carmack, one of the defendants in the above entitled cause. And let the record note the appearance of Mr. Hasson and Mr. McNerney, whose titles have been previously given to the reporter.

Is that correct?

Mr. Hasson: Yes.

Mr. Mc Nerney: Yes. I note Mr. Hart has just come in. Do you desire to question him now?

Mr. Kelso: At once.

R. S. Hart was thereupon called as a witness for the defendant, Iska W. Carmack, in the above entitled case, and, the oath having been waived, deposed and answered to questions propounded by counsel as indicated hereinbelow, and testified as follows:

Direct Examination.

By Mr. Kelso:

Q. Mr. Hart, will you give the reporter your name?

A. R. S. Hart; room 5322 - Federal Works Agency Building. That is this building.

And at the present time I am Acting Chief of Architecture.

Q. How long have you acted in that capacity?

[fol. 529] A. About a year and a half.

Q. Who was your predecessor?

A. Mr. Noll.

Q. Is Mr. Noll with you now?

A. No, sir. He has retired.

Q. Before you became Chief were you Acting Chief?

A. Acting Chief. Yes.

Q. Before you became Acting Chief were you with this organization?

A. Yes. I was a Group Chief.

Q. You are familiar with the matters that you are testifying about, as I understand it?

A. Well, I plan on telling only what I know. I am not telling what I don't know, or hearsay.

Q. Quite correct. But I do not have the questions that were referred to before the reporter started to take this testimony, which were prepared and which it was stated you were familiar with? A. Yes, sir.

Q. I didn't get a copy of that.

Q. I can't answer all of those questions, because I am not familiar with them, with the answers, but the most of them I think I can.

Q. Before we start on that, may I inquire whether you have a map of the town or the city of Cape Girardeau, Missouri, showing the streets?

[fol. 530] A. I don't have a map of the town. But I have a map of the Park. (Producing a map.)

By whom it was made I don't know, but I was in Cape Girardeau, and, in general, it is correct, as far as layout is concerned.

I would not say that the grades or elevations that are placed thereon are correct. I have not checked those.

Q. Have you extra copies of that map?

A. No, sir.

Q. Do you know where Themis Street is?

A. Yes, sir.

I might add here, if you will permit me to say, I was there a little over two years ago, and recall the surroundings of the park.

Q. Do you know how long Themis Street is?

A. No, sir.

Q. Do you know whether it is a residential street or a business street?

A. No, sir. Not as a whole. I know only about it in connection with the park. That is all.

Q. So far as the connection with the park is concerned, it is all residential west of the park on Themis Street, isn't it?

A. I only know of one street west on or on the park and that is a residential street.

[fol. 531] Q. You mean, one block?

A. Yes. One block.

Q. And do you know anything about Broadway Street?

A. I remember there was a Broadway, and if I recall correctly that is to the north of the park. I walked up and down that street several times. And if that is the same street—I don't think it is shown here (indicating.) That is over here. (Indicating.)

Q. Broadway is not shown on your map? A. No, sir.

Q. But you do know that Broadway is the street that runs from the Mississippi River west for approximately two miles?

A. I wouldn't say that. I don't know. I know it does run from the Mississippi River beyond the general location of this Park, and up beyond the post office. However, I don't know.

Q. You mean, the present post office?

A. The present post office, yes.

Q. On one corner of that property, where the present post office is, is the Marquette Hotel? A. Yes, sir.

Q. On the other corner is the Himmelberg-Harrison Office Building?

A. I wouldn't know. The reason I know about the hotel is because I stopped there.

[fol. 532] Q. On the other corner is the Idanha Hotel?

A. I wouldn't know that.

Q. Well, if you stopped at the Marquette Hotel you do know that Broadway is a business street? A. Yes, sir.

Q. Do you know anything about the street that runs east and west of your proposed planning and on the west side thereof?

What is the name of that street?

A. On the west side of the park?

Q. Yes.

A. Lorimier street.

Q. Themis Street terminates in Lorimier?

A. I would say so.

Q. Now then, this street, Broadway, is not adjacent to the park? It is north of but not adjacent to the park on the north?

A. That is correct.

Q. The Presbyterian Church and buildings are intervening there, and come between the park site and Broadway?

A. There are some buildings there. What they are, I don't know. I don't remember.

Q. Well, the park property does not go to Broadway?

A. That is correct.

Q. Your proposed plan does not take in all of the property north of the present court house and between that [fol. 533] and Broadway? A. No, sir.

Q. There is no street shown by your plat, public street, adjacent to the park on the south?

A. No, sir.

Q. On the east side of the park the name of the street is Spanish Street?

A. That I could not say. Because, while I was there two years ago, I don't remember the name of the street except by having it recalled to my memory since I have returned.

None of the drawings that we have been working on show Spanish Street. They don't show any street at all on the other side of that park.

Q. On the east? A. On the east.

Q. Your plat does not show how far it is from the east of the park to the Mississippi River?

A. No, sir.

Q. And you do not know the type of business, if any that is on Spanish Street?

A. That is correct.

Q. Do you know how far the proposed site of your building—proposed building—is west of the property line of Lorimier Street?

A. You mean, west?

[fol. 534] Q. I mean as you go east of the west property line, how far is the west line of your proposed building east of the west side of Lorimier Street?

A. We are proposing to set the building approximately 141 feet back from the east side of the property line on Lorimier Street. When I say 141 feet I mean the west face of the building.

Q. Now then, will you tell me, approaching it from the east side, what is the character of the land on that side—or, to put it directly, it is a bluff, isn't it?

A. It is a series of terraces from Spanish Street on up to the present building there.

Q. How many steps would you say it is from the street on the east side, which you now call Spanish Stree , to the level of the ground on whic you propose to locate the building?

A. I don't know.

Q. How far is the east side of your building—how far will it be from the west side of Spanish Street?

A. I don't know.

Q. Who prepared the survey of the property for you that you are now referring to as the site that you are seeking to condemn?

A. I don't know the name of the man. I presume it can be obtained. I don't have that information. Before I went [fol. 535] out there the survey was handed to me, so I don't know who prepared it.

Mr. Hasson: Is that a survey or simply a drawing prepared in this office?

The Witness: This is a drawing that I had prepared after my return from Cape Girardeau. That doesn't give a survey of the entire park.

Mr. Hasson: No. But somebody surveyed and gave you a description of the property that you now refer to as the property that you want to acquire by condemnation.

Mr. Hart: That was done before I went out there and before I had anything to do with the project. I don't know his name. I presume that can be obtained in the office somewhere.

By Mr. Kelso:

Q. Was that done by the City Engineer of Cape Girardeau, Mr. Hart?

A. I don't know. The survey would indicate that. I don't have a copy of the survey.

Q. Did you ever have a copy of the survey?

A. Yes. I had a copy of the survey when I went out there. But, I don't have it with me now.

Q. I assume, Mr. Hart, that the questions as to the site that you say have been referred to, so far as you know have been fully answered, so far as your knowledge goes?

[fol. 536] A. Yes, sir.

Q. And you were furnished with a typewritten copy of the matter and checked it up?

A. Yes, sir.

Q. And the only ones that you can answer are the ones that you have answered?

A. Yes, sir.

Mr. Hasson: I have no questions, but I don't see how this relates to the selection of the building site.

Mr. Kelso: That's all.

Mr. Mc Nerney: I have one question I would like to ask and that is:

Cross-Examination.

By Mr. McNerney:

Q. Mr. Hart, do you know from your inspection of this site whether there will be any more steps for the people to come up to this site from Spanish Street than are required at present going to the existing court house?

A. There will be no more steps. No, sir. In fact, we plan on using the present elevation, the plateau where the present building is, as the grade around the new building within a few inches.

Mr. McNerney: That is all I have.

Redirect Examination.

By Mr. Kelso:

[fol. 537] Q. Do you in your planning contemplate building streets and sidewalks through this property?

A. We are not planning on building a street through the property.

We are planning on providing a driveway so that mail trucks and merchant mailers can get their material in to the loading platform of the post office.

Q. I didn't understand, until Mr. McNerney asked that question, that you were qualified to testify regarding the project and the architectural design of it and the general specifications, or I would have gone into that.

Do you know now how much the level of that ground on which the proposed building is to be located is above Spanish Street?

A. No, sir. I do not.

Q. Did you climb those steps?

A. I did. I didn't count them, though.

Q. Well, it is 55 or 60 steps, isn't it? It is a bluff?

A. It is quite high, yes, sir. There are several series of terraces, and, of course, as you climb from one terrace to another terrace there are, may be, ten—six or ten steps in each flight. There might be five or six terraces.

Q. It is your thought that the plan contemplates the cutting of the park down to the level of Spanish Street?

A. No, sir. We plan on using the present finished [fol. 538] grade around the new building. In other words, it will be at the same level as the present building.

Q. By the "present building" you mean the present court house, the Common Pleas Court House?

A. Yes, sir.

Q. Then you will still have to climb from the street? Whatever it is now, it will be when you put up the new building?

Q. On that particular side of the new building, yes. The Property that was surveyed and given to me as the part for us to use, did not go over as far as the first terrace steps.

Q. So then, all that will be left for the city after the Government has acquired this property will be the terraces?

A. On that side.

Q. On the east. That covers the whole east side of the property? A. No.

Q. The east side of the park, the terraces?

A. The terraces run from the north to the south, or approximately. According to our survey we are only obtaining a portion of the center part of the park site.

Q. That is exactly the question I asked.

Then, all of the property east of your proposed site that [fol. 539] will be left, will be the terraces?

A. Yes, sir.

Q. Where will your driveway come in, from the west?

A. From Lorimier Street, farther to the south with respect to Themis Street.

Q. With respect to the library, where do you propose to bring it in?

A. South of the library.

Q. From Lorimier Street, south of the library?

A. Yes, sir.

Q. Are you going to make a circle drive-in?

A. No. We will make a drive leading in from Lorimier Street and a parking space, and a space for [maneuvring] mail trucks, sufficiently large to turn around.

Q. Now, then, how much do you leave in [teh] park north of the property described in your condemnation suit? A. I don't know.

Q. The Public Library building lies west of your proposed building?

A. West and south.

Q. But it will be out in front of your new building?

A. In front of the southern part of the new building.

Q. And the trees on the west of the court house, do you plan to remove those trees?

A. Only two of them, two of them that will be in the [fol. 540] way of the building, of the new structure.

Q. Do you propose to leave all the trees and shrubs on the west?

A. Yes, sir.

Q. And will you leave the monuments that are there, according to your plans?

A. It is not contemplated at this time to take them down.

Q. You are going to leave the Soldiers' Monument there?

A. As far as I know. It is not intended, according to the sketches that have been prepared and approved, to disturb them.

Q. Is there anybody with authority to speak, to put into the case, into the pleadings or the evidence a statement showing that the Government does not intend to disturb any of the buildings located on the property?

Mr. Hasson: I object.

Mr. Kelso: I just want to know if he knows. He is taking a wide latitude.

Mr. McNerney: There is the Library Building, Judge. Are you excluding that in your questions?

Mr. Kelso: No. I am letting him answer for himself. I can't do that, because I don't know what he will say. Up to this time I had a different idea from what he is saying [fol. 541] now.

The Witness: Well, the only one that I know that will be taken down is the court house.

Who else can say, I don't know.

By Mr. Kelso:

Q. Then the plan that you have does not contemplate any changes whatever in the monuments?

A. That is correct.

Q. Or in the Soldiers' Monument?

A. That is correct.

Q. Do the plans show that they are to remain permanently?

A. They would not show that. They would just say "to remain." There is no definite time.

Q. Well, it would be located entirely on Government property?

A. The monument you refer to?

Q. Yes. A. Yes.

Q. And all of the property, all of the structures west of the proposed building will be on property that the Government seeks to acquire in this proceeding by condemnation?

A. All except the bandstand, which is only a very small part of it Government property, and that is to the north.

[fol. 542] Q. Is it contemplated that they will leave the Library Building?

A. I am not familiar with that. At the present time it says "to remain," but how long I don't know. It might be taken off before we get them built.

Q. The Library Building might be taken off before you get it built?

A. That is the possibility. I don't know what the deed or the contract with the owners calls for.

Q. And you don't know what the contract specifies relative to any of these matters—I mean any of the structures on that property?

A. That is correct.

Mr. Hasson: He did say that they contemplated taking down the main buildings.

The Witness: We would have to do that in order to put up the new building.

By Mr. Kelso:

Q. The Government intends to tear down the Common Pleas Court House at its own cost and expense?

A. That I am not familiar with. The only [think] I can say is that it will have to come down if we put the building where we now contemplate it. Who is to take it down and whose property it will become, I am not familiar with.

[fol. 543] Q. And you don't know anything about the terms of any contract with respect to the other structures that are remaining or are being removed?

A. That is correct.

Q. You do know that everything on there west of the proposed building will be on property which you are now seeking to condemn? That will be the Library, the Soldiers' Monument, the Bajer Monument—all of those monuments in there?

A. I am just speaking after looking at the drawings, the sketches that were prepared.

Q. Who prepared the sketches?

A. I did. West of the new post office and court house building, contemplated building, according to this drawing there is an existing fountain, there are two mounted cannon, there is a sun dial, there is a library, there is a shed, all marked as existing, and nothing is to be done to them as far as I know.

Q. Mr. Hart, did you know or have any understanding about it one way or the other? Did you have any instructions about it when you went down there?

A. My instructions were the survey that I received. I don't know where it is now. I don't have it. And I was sent down there to locate the building where I thought it would be best on that particular site, and to discuss with [fol. 544] the occupants of the existing post office their space requirements in the new building.

Q. That was the extent of your activity?

A. That was the extent of my trip there.

Q. Then you expressed a moment ago, I think that you were there on another problem, other than the matters that I am inquiring about?

A. Yes, sir.

Mr. Kelso: That's all.

Recross Examination.

By Mr. Hasson:

Q. Mr. Hart, you stated your duties were to go down there and locate the building on the site that was to be secured for this particular site. Did you have anything to do with recommending the site for selection by the Postmaster-General and the Federal Works Administrator? A. No, sir.

Q. You made the statement a little while ago that all that would be left on the east side of the building would be terraces. Aren't all those terraces included in the Government acquisition down to Spanish Street?

A. No, sir. The new property comes up to the terraces. The terraces are out beyond. The property lines come about to here. The terraces are down beyond that. (Indicating.)

Q. Mr. Hart, the building plan that you have now is [fol. 545] simply a proposed plan which may be changed in the future?

A. Yes, what we call "tentative."

The Witness: Is that all?

Mr. McNerney: That's all.

Mr. Kelso: Thank you, Mr. Hart.

Mr. Hart: May I be excused?

Mr. Kelso: Yes, sir.

And Further Deponent Saith Not.

Let it be remembered that the signature of the witness hereunto, and the oath of the witness have each been waived by both parties, the testimony of the witness to have the same force, effect, and weight as if said oath had been taken, and as if the witness had hereunto affixed his seal and subscribed his hand.

The above and foregoing is a true transcript of the questions and answers, asked and made respectively, given by the said parties as hereinabove set forth.

HOWARD B. SMITH,
Reporter.

Subscribed and sworn to before me this 22nd day of November, A. D., 1943.

(Seal) MARGARET C. SCOFIELD,
Notary Public.

My Commission expires Aug. 31, 1948.

[fol. 546] Mr. Kelso: What I wanted to get at, Mr. Hasson, is this: That Mr. McNerney and myself checked over the stipulation and all the corrections in the original that was filed, and agreed to at the last taking of depositions. That has been corrected and signed by the attorney for the Defendant, Iska W. Carmack, and left with Mr. McNerney, and that will explain why we haven't turned it over.

When we get through with it and get it signed, the original is to be, in accordance with our agreements, turned over to the reporter and filed and treated as a part of this deposition.

Since Mr. Hall, the shorthand reporter, who took that, is not here, it would be wise to have that fact stated in the record.

Mr. Mc Nerney: This is a re-write of what we went over yesterday.

The only thing is, I don't want to keep Mr. Reynolds waiting. Suppose we go out to see him now.

(There was a short pause.)

Mr. Hasson: Mr. Reporter, I hand you the original copy of the agreed statement of facts, or rather here is the stipulation signed by the attorneys for the Plaintiff in this proceeding and by the attorney for the Defendant, Iska W. Carmack, one of the defendants in this proceeding, stipulating certain facts about which we spoke yesterday.

[fol. 547] Mr. Kelso: The copy handed to you is the original copy of the final revised, signed draft of the stipulation in the above-entitled cause, stipulating between the United States of America and the Defendant, Iska W. Carmack, signed on the tenth day of November, 1943, by the

United States of America, by its attorney, and by Iska W. Carmack, one of the defendants in this case, by her attorney, and approved by the Federal Works Agency by its attorney, which is to be treated as a part of the depositions and transmitted, together with the other papers, to the United States District Court, Eastern District of Missouri, Southeastern Division, in the case that you are now reporting.

And you will now identify the stipulation in a way that will mark it and identify it as having been received and filed by you today, and marked with your name or initials on it.

(The reporter initialed the stipulation "H.B.S." and by direction of the attorney for the plaintiff and the attorney for the defendant, Iska W. Carmack, copied said stipulation into the record, which is as follows:)

* * * * * * * * *

[fol. 548] (Agreed Satement of Facts.)

The Agreed Statement of Facts was made a part of the typewritten transcript of record at this place, but same is omitted from the printed record to avoid duplication inasmuch as such Agreed Statement of Facts heretofore appears in this printed record as Defendants' Exhibit A at folio page 194 of this printed record.

[fol. 563] Mr. Hasson: Now, the next thing is to state an agreement between the parties relative to the following facts—

It is agreed by and between [redacted] parties, and so forth—

Mr. Mc Nerney: It is agreed, by and between the parties, that the attorney representing the defendant, Iska W. Carmack, in the above entitled proceeding, after conference with Mr. W. E. Reynolds, Commissioner of the Public Buildings Administration and Chairman of the Joint Committee on the selection of the site for the proposed Federal Post Office, Custom House, and Court House in Cape Girardeau, Missouri, that the taking of Mr. Reynolds' deposition is waived, upon Mr. Reynolds' con-

sent, after advice of Government counsel, to make available as a part of the record in this proceeding the letter of transmittal and the report of Post Office Inspector M. J. Deutsch, together with all exhibits and enclosures referred to therein, and also the agreement between the City of Cape Girardeau, Missouri, and the United States Government, relating to the exchange of the present Federal Office Building and site for the proposed new Federal Building site involved in this proceeding.

Mr. Kelso: It is further agreed, by and between the parties hereto, that the Postmaster-General, Frank C. Walker, and the Federal Works Administrator, Major General Philip B. Fleming, signed the site selection upon [fol. 564] the recommendation of the Joint Committee considering the selection of the site for a Post Office, Custom House, and Federal Court Building, at Cape Girardeau, Missouri, and involved in this proceeding.

After conference between the attorneys regarding the taking of the depositions of Frank C. Walker, Post-Master General, and Major General Philip B. Fleming, Federal Works Administrator, the attorney for the defendant, Iska W. Carmack, waives the taking of their depositions and agrees as follows:

Mr. Mc Nerney: You are going to state your agreement?

Mr. Kelso: I am satisfied from the statements made by the attorneys of the Department of Justice appearing here for the plaintiff in the above entitled cause and from the statements made by counsel appearing for the Federal Works Administrator and also from the testimony of Mr. Witman, that the Postmaster General, Frank C. Walker, and the Federal Works Administrator, Major General Philip B. Fleming have no independent knowledge of any facts relating to the selection of the site sought to be condemned in this proceeding other than the fact that they signed the request to institute suit to condemn property for a Post Office and Custom House site at Cape Girardeau, Missouri.

Under the circumstances I am willing for the record [fol. 565] to show the following agreement:

It is agreed, by and between the United States of America, plaintiff in the above entitled cause, and Iska W. Carmack, one of the Defendants in the above entitled cause that this record shall show that the attorney for the Defendant, Iska W. Carmack, for the reasons already stated in this record, waives the taking of the depositions of Honorable Frank C. Walker, Postmaster General, and Major General Philip B. Fleming, Federal Works Administrator.

Mr. Hasson: Mr. Reporter, where is your office?

Mr. H. B. Smith (The reporter): 601, 602 Mills Building, which is at the corner of Pennsylvania Avenue and Seventeenth Street, North West, Washington, D. C. It is just about three blocks from your office here.

Mr. Mc Nerney: We will deliver to the shorthand reporter at the address just stated by him, tomorrow, a certified copy—I assume you want a certified copy—of the letter of transmittal and the report of the Post Office Inspector M. J. Deutsch, together with all exhibits, papers, documents, and enclosures referred to therein; also deliver to him at the same time the agreement between the City of Cape Girardeau, Missouri, and the United States of America relating to the exchange and transfer of the Federal Post Office Building and site for the proposed new Federal Building and site involved in this proceeding.

[fol. 566] Mr. Hasson: Are you through with your depositions?

Mr. Kelso: You intend to deliver to the shorthand reporter certified copy of the Deutsch report and accompanying papers as just stated by Mr. McNerney?

Mr. Hasson: That is right. Yes, that is perfectly satisfactory.

Mr. Kelso: With that agreement, I am through.

Mr. Hasson: As far as I am concerned, we are all through and finished.

Mr. Kelso: The reporter's record should show that it is agreed by and between the attorneys appearing for the United States of America, Plaintiff in the [abovce] en-

titled cause, and the attorney for the Defendant, Iska W. Carmack, that the taking of the depositions in the above entitled cause shall be finally closed, and that the attorneys for the Plaintiff, United States of America, will deliver on the morning of November 11, 1943, to the said shorthand reporter, Howard B. Smith, at 601, 602 Mills Building, corner of Pennsylvania Avenue and Seventeenth Street, North West, Washington, D. C., to be transmitted to the Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division, Cape Girardeau, Missouri, as a part of these depositions, the letter of transmittal and the report of the Post Office Inspector M. J. Deutsch, together with all exhibits, papers, documents, and enclosures referred to therein, and also the agreement [fol. 567] between the City of Cape Girardeau, Missouri, and the United States of America relating to the exchange and transfer of the Federal Post Office Building and site for the proposed new Federal Building site involved in this proceeding.

And further, that the shorthand reporter shall transcribe the record of the proceedings and prepare and transmit the record of said proceedings to the Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division, Cape Girardeau, Missouri, [property] certified and sworn to before a Notary Public in accordance with the agreement between the parties spread upon the record in this case.

And of Further Proceedings There Were Had None.

HOWARD B. SMITH,
Reporter.

Subscribed and sworn to before me this the 22nd day of November, A. D., 1943.

(Seal) MARGARET C. SCOFIELD,
Notary Public.

My Commission expires on the 31st day of Aug., 1948.

[fol. 568] In The United States District Court Eastern District Of Missouri, Southeastern Division.

Condemnation Suit. File No. 482.

October Term, 1943.

United States of America, Plaintiff,
Civil Action vs. File No. 482
Certain Land Situate In The City Of Cape Girardeau, County Of Cape Girardeau, State Of Missouri, Et Al., Defendants.

Affidavits

By

Shorthand Reporters,

J. M. Hall and Howard B. Smith

Attached To

The

Return Of The Depositions

By Agreement

Between

United States Of America, Plaintiff,

(In The Above Entitled Cause)

And

Iska W. Carmack,

(One Of The Defendants In The Above Entitled Cause.)

[fol. 569]

Separate Affidavit

Of

J. M. Hall

Shorthand Reporter

Affiant, the said J. M. Hall, of lawful age, first duly sworn by Margaret C. Scofield, a Notary Public, within and for the District of Columbia, in the United States, does hereby certify that the statements contained in the certificate of the said Shorthand Reporters, J. M. Hall

and Howard B. Smith, hereinabove set out are, to the best of his knowledge and belief, true and correct statements of the facts therein set forth; and this [affidant] further certifies that the statements hereinafter set out in this affidavit are, to the best of his knowledge and belief, true and correct;

Clause I: That this affiant, the said J. M. Hall, Shorthand Reporter as aforesaid, further states that wherever the terms or expressions "by the agreement of the parties" or "by agreement of parties" appear in the said certificate hereinabove set out, the transcript of the Record of the proceedings, and/or in the affidavit, said terms or expressions are intended to refer to the United States of America Plaintiff and Iska W. Carmack, one of the de-
[fol. 570] fendants, in a certain cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482, Condemnation Suit, October Term, 1943, wherein United States of America, is Plaintiff and Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., are Defendants.

Clause II: That Affiant, the said J. M. Hall, further states that he is one of the said Shorthand Reporters above mentioned and that he is engaged in business with the above mentioned Shorthand Reporter, Howard B. Smith, with offices in Rooms 601, 602 Mills Building, Pennsylvania Avenue and Seventeenth Street, North West, in said City of Washington, District of Columbia, in the United States; and that this affiant and the said Howard B. Smith took all of the testimony set out in the above and foregoing transcript of the proceedings had in the taking of Depositions in the above entitled cause, stenographically and transcribed the same by agreement of parties to the taking of Depositions which are returned herewith by this Affiant and the said Howard B. Smith, Shorthand Reporters, by agreement of the parties.

Clause III: Affiant, the said J. M. Hall, Shorthand Reporter as aforesaid, further states that B. J. Hasson, attorney, Department of Justice, appearing for the United
[fol. 571] States of America, Plaintiff in the above entitled cause and I. R. Kelso, attorney, with Offices in the

First National Bank Building at Cape Girardeau, Missouri, appearing as attorney for Iska W. Carmack, one of the Defendants in the above entitled cause, did, on the First day of November, 1943, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of Norman Littell, Assistant Attorney General, Land Division, Department of Justice, Room 2539 agree, as follows:

(a) That the presence of a Notary Public at the taking of the Depositions in the above entitled cause was duly waived by the Plaintiff and Iska W. Carmack, one of the Defendants in the above entitled cause.

(b) That by agreement between the said B. J. Hasson, Attorney, appearing for the Plaintiff as aforesaid and the said I. R. Kelso, Attorney, appearing for Iska W. Carmack, one of the Defendants in the above entitled cause, as aforesaid, this Affiant, J. M. Hall, Shorthand Reporter, as aforesaid was directed by the said Attorney appearing for the said Plaintiff as aforesaid and by the said Attorney appearing for Iska W. Carmack, one of the Defendants, as aforesaid, to let the Record of the taking of the said Depositions by this Affiant, show the filing of a certain stipulation or agreement with this affiant, Shorthand Reporter, as aforesaid, which said stipulation is in words [fol. 572] and figures (omitting the Caption and signatures of the parties) as follows:

"Stipulation between parties regarding the [takingm] of depositions in the matter of selection of the site for the proposed Post Office and Custom House at Cape Girardeau, Missouri.

"The parties hereto agree that:

"1. The taking of oaths shall be waived as a matter of course, unless either party desires the sworn statement of any particular witness.

"2. And all testimony shall be taken stenographically and transcribed, and, the signing of depositions is waived. In addition to objections at the time of taking testimony, any question may be objected to for any reason, other than the form thereof, at the hearing or trial at which the depositions shall be presented, notwithstanding the fact that no

objection was made at the taking of the depositions, if notice of such objection is given to the opposing party's attorney at least ten days before such hearing, the ruling on the admissibility or relevancy to be made by the Court.

"3. The certificate of the shorthand reporter shall be sworn to before a notary public."

[fol. 573] (c) That by agreement between said Plaintiff in the above entitled cause, and the said Iska W. Carmack, one of the Defendants in the above entitled cause, came before me, the said J. M. Hall, affiant herein, one of the Shorthand Reporters hereinabove named, at the places, on the dates, and within the hours, fixed by agreement between said Plaintiff, and said Defendant, Iska W. Carmack, the persons hereinafter named, to-wit: E. R. Witman and J. F. Betterley.

Affiant further states that the Depositions of the above named witnesses taken by this affiant, J. M. Hall, Shorthand Reporter as aforesaid, by agreement between the said Plaintiff and the said Defendant, Iska W. Carmack, are herewith returned, together with the signed agreements and exhibits referred to in their said Depositions and filed with this affiant, J. M. Hall, the aforesaid Shorthand Reporter.

(d) That Affiant, J. M. Hall, further states that the said witnesses, to-wit: E. R. Witman and J. F. Betterley, appeared before this Affiant, Shorthand Reporter as aforesaid, by agreement of parties, on the dates hereinafter mentioned, to-wit:

E. R. Witman appeared before Affiant, Shorthand Reporter as aforesaid, on November 2, 1943, between the hours of eight o'clock in the forenoon and six o'clock in [fol. 574] the afternoon of that day, at Room 6324 Federal Works Building; that the taking of the oath and the signing of the Deposition were waived, and said witness examined. The testimony of said witness is set out in the above and foregoing transcript, commencing at page 53 and ending at page 66 of said transcript of the testimony, that witness E. R. Witman, continued his testimony on the 9th day of November, A. D., 1943, and the further testimony of said witness is set out in the above and foregoing

transcript, commencing at page 124 and ending at page 144 of said transcript of the testimony:

J. F. Betterley appeared before Affiant, Shorthand Reporter as aforesaid, on November 9, 1943, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at Room 6324 Federal Works Building; that the taking of the oath and the signing of the Deposition were waived, and said witness examined. The testimony of said witness is set out in the above and foregoing transcript, commencing at page 145 and ending at page 146 of said transcript of the testimony.

(e) Affiant, J. M. Hall, Shorthand Reporter, further states that all of the proceedings had in the taking of the said Depositions were taken stenographically and transcribed by this affiant, J. M. Hall, Shorthand Reporter, as aforesaid, except the proceedings had on the tenth day [fol. 575] of November, A. D., 1943, at Room 4121 Federal Works Building, (Old Department of Interior) City of Washington, District of Columbia, in the United States, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, which said proceedings were taken stenographically and transcribed by Howard B. Smith, Shorthand Reporter, as aforesaid and set out in the said transcript of the [testimmny], commencing at page 152 of said above named and foregoing transcript and ending on page 192 of said transcript.

JOSEPH M. HALL,
Reporter.

Subscribed and sworn to before me on this 22nd day of November, 1943.

(Seal)

MARGARET C. SCOFIELD,
Notary Public.

My commission expires 31st day of Aug., A. D. 1948.

[fol. 576]

Separate Affidavit
Of
Howard B. Smith
—Shorthand Reporter

Affiant, Howard B. Smith, of lawful age, first duly sworn by Margaret C. Scofield, a Notary Public, within and for the District of Columbia, in the United States,

does hereby certify that the statements contained in the above and foregoing Separate Affidavit of J. M. Hall, subscribed and sworn to on the 22nd day of November, 1943, by said J. M. Hall are, to the best of his knowledge and belief, true and correct.

Affiant, Howard B. Smith, further certifies that he is the said Howard B. Smith, Shorthand Reporter, mentioned in said above and foregoing Separate Affidavit of said J. M. Hall.

Affiant, Howard B. Smith, further certifies that witness R. S. Hart came before this affiant, Howard B. Smith, Shorthand Reporter, as aforesaid, on the Tenth day of November, 1943, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at Room 4121 Federal Works Building, (Old Department of Interior) City of Washington, District of Columbia, in the [fol. 577] United States, the taking of the oaths and the signing of the Depositions by the said witnesses were duly waived by agreement of the parties; the said witness was duly examined and his examination taken in shorthand and transcribed by this affiant as set out in the above transcript of his examination, commencing at and on page 153 and ending on page 170 of said transcript.

Affiant, Howard B. Smith, Shorthand Reporter as aforesaid, further certifies that the Attorneys appearing for the United States of America, Plaintiff in the above entitled cause, at the taking of the said Depositions of said witness on November tenth, 1943, at said Room 4121, agreed to deliver to this affiant, Howard B. Smith, Shorthand Reporter as aforesaid, on the morning of November eleventh, 1943, to be transmitted, by his affiant, to the Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division, at Cape Girardeau, Missouri, as a part of the Depositions taken in the above entitled cause, by agreement of the parties as aforesaid, to be returned to the Clerk of said Court by agreement of the parties as aforesaid, by this affiant, Shorthand Reporter, as aforesaid, a certain letter of transmittal, together with a certain report, referred to in said letter, made by Post Office Inspector M. J. Deutsch, also all exhibits,

papers, documents and enclosures attached to said Report or therein referred to; also a certain agreement between [fol. 578] the City of Cape Girardeau, Missouri, and United States of America, [realting] to the exchange and transfer of the Federal Post Office Building and Site for the proposed new Federal Building Site, involved in this proceeding.

Affiant, Howard B. Smith, Shorthand Reporter as aforesaid, further certifies that said transmittal letter, Report of Said Post Office Inspector M. J. Deutsch, together with all exhibits, papers, documents and enclosures, referred to in said Report as aforesaid; and the agreement between the City of Cape Girardeau, Missouri, and United States of America relating to the exchange and transfer of property as aforesaid, can not be returned by this affiant and transmitted to the said Clerk of said United States District Court, for the reason that said Attorneys appearing for the Plaintiff at the taking of said Depositions as aforesaid, before this affiant, Howard B. Smith, Shorthand Reporter as aforesaid, did not comply with their said agreement to deliver to this Affiant, Howard B. Smith, Shorthand Reporter, as aforesaid, to be transmitted as a part of the Depositions taken by agreement as aforesaid, the said certain letter of transmittal, together with said certain report, referred to in said letter, made by Post Office Inspector M. J. Deutsch, also all exhibits, papers, documents, and enclosures, attached to said Report or therein referred to, as aforesaid; aiso said cer- [fol. 579] tain agreement between the City of Cape Girardeau, Missouri, and United States of America, relating to the exchange and transfer of property, hereinabove described.

HOWARD B. SMITH,
Reporter.

Subscribed and sworn to before me on this 22nd day of November, A. D. 1943.

(Seal)

MARGARET C. SCOFIELD,
Notary Public.

My Commission expires Aug. 31, 1948.

[fol. 580] United States of America,
District of Columbia.

I, Margaret C. Scofield, a notary public, duly commissioned and qualified, in and for the District of Columbia, of the United States, do hereby certify that pursuant to the annexed agreement to take the testimony of witnesses before Shorthand Reporters without requiring the presence of a Notary Public at the taking of the said Depositions, pursuant to annexed notice in the above entitled cause, came before me at Room 601, 602 Mills Building, Pennsylvania Avenue and Seventeenth Street, North West, in said City of Washington, District of Columbia, J M. Hall and Howard B. Smith, known to me personally, and known to me to be Shorthand Reporters, with offices in said Mills Building, who were by me first severally sworn stated that they acted in the capacity of Shorthand Reporters in the taking of the Depositions of witnesses mentioned in the transcript of the proceedings and the certificates of said J. M. Hall and said Howard B. Smith, subscribed and sworn to by said J. M. Hall and said Howard B. Smith, to-wit:

(a) That pursuant to the annexed notice to take depositions of witnesses to be read in evidence in the above entitled cause on the part of Defendant, Iska W. Carmack, [fol. 581] the parties by agreement commenced the taking of said Depositions at the office of Norman Littell, Assistant Attorney General, Land Division, Department of Justice, Room 2539 in the City of Washington, District of Columbia, on the First day of November, 1943, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day; that by agreement of the parties, the taking of said depositions, was continued from day to day, at the places agreed upon by and between the Attorneys appearing from day to day for the United States of America, Plaintiff in the above entitled cause, and the attorney appearing for Iska W. Carmack, one of the Defendants in the [aboves] entitled cause, at the taking of said Depositions, and between the same hours fixed by the said annexed notice until completed on the tenth day of November, 1943. That all adjournments from day to day were by agreement of parties, as fully set out in the

certificates and affidavits of said J. M. Hall and said Howard B. Smith, respectively, hereinabove set out and in the transcript of the examination of the witnesses hereinabove set out.

(b) That all of the testimony was, by agreement of the parties, taken in shorthand and transcribed by the said Shorthand Reporters, J. M. Hall and Howard B. Smith, respectively, as hereinabove set out; the taking of oaths and the signing of the depositions were duly waived, [fol. 582] by agreement of the parties, all of which will fully appear in the said certificates of the said Shorthand Reporters and the transcript of proceedings had at the taking of said Depositions, hereinabove set out as aforesaid.

(c) That said Depositions taken, by agreements of the parties as aforesaid, to be read in evidence on the trial of a certain cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, wherein United States of America is Plaintiff, and Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al., are Defendants, Condemnation Suit File No. 482 October Term, 1943, on the part of Iska W. Carmack one of the Defendants in the above entitled cause.

(d) That by agreement of parties this certificate is made, subscribed, and sworn to by said J. M. Hall and said Howard B. Smith; respectively, as aforesaid; and they hereby certify that the statements contained in this and the other certificates by them made as aforesaid are, to the best of their knowledge and belief, true and correct.

JOSEPH M. HALL,
Reporter.

HOWARD B. SMITH,
Reporter.

Subscribed and severally sworn to before me this 22nd day of November, A. D. [L943].

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal this 22nd day of Nov., 1943.

Notary Public Within And For The District Of Columbia.

(Seal)

My commission expires Aug. 31, A. D. 1948.

[fol. 583] In The United States District Court
Eastern District Of Missouri
Southeastern Division

Notice To Take Depositions

United States of America, Plaintiff,
File No. 482 vs. Civil Action
Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, et al.,
Defendants.

Condemnation Suit: File No. 482.

October Term, 1943

To Harry C. Blanton, United States District Attorney for the Eastern Judicial District of Missouri, Attorney of Record for Plaintiff in the above entitled cause.

You are hereby notified that depositions of witnesses to be read in evidence in the above entitled cause on the part of defendant, Iska W. Carmack, will be taken at the office of Norman Littell, Asst. Atty. General Lands Division, Dept. of Justice, Rm. 2539 in the City of Washington, District of Columbia, on the 1st day of November, 1943, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day; and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place and between the same hours until completed.

You are hereby further notified that it is necessary, under the proceedings required by the Mandate of the United States Circuit Court of Appeals for the Eighth

Circuit, received, filed, and entered (together with a copy of the opinion of the said Circuit Court of Appeals in the above entitled case) in the United States District Court, Eastern District of Missouri, on June 4, 1943, for defendant, Iska W. Carmack, to take the depositions of the witnesses hereinafter described, to-wit:

[fol. 584] (a) The Administrator of the Federal Works Agency of the United States of America, and all persons who represented said Administrator, also all persons who represented the Postmaster General of the United States of America who participated in the joint action of said persons in selecting the public buildings and public park in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, for the construction and erection of a United States Post Office and Custom House Building, as alleged in paragraph Sixth of plaintiff's (Second) Amended Petition in condemnation filed herein, by the said Harry C. Blanton, United States District Attorney, attorney of record for plaintiff, as aforesaid, by direction of the Attorney General of the United States, at the request of said Administrator of the Federal Works Agency of the United States of America, as alleged in said paragraph Sixth of plaintiff's said (Second) Amended Petition, as aforesaid. The names and addresses of the persons who acted jointly in selecting said public property as a site or location for a new Post Office and Custom House Building in the City of Cape Girardeau, Missouri, are not disclosed in plaintiff's said (Second) Amended Petition filed herein as aforesaid, and are unknown to either the said defendant, Iska W. Carmack, or her attorneys of record, L. Lee Bowman and I. R. Kelso; that the general description of said witnesses above referred to is sufficient to identify each person to be examined, or the particular class or group to which the witnesses belong; that the names of said witnesses are known or can be easily ascertained by the attorneys of record for plaintiff from the Office of the Administrator of the Federal Works Agency of the United States of America.

(b) All Federal agents, engineers, architects, site investigators, and liaison officers who acted for the Commis-

sioner of Public Buildings, Federal Works Agency, Public Buildings Administration, and the Post Office Department in any and all matters connected with or relating to the [fol. 585] selection of the public buildings and public park as a location or site for the construction and erection of a new Post Office Building and Custom House in the said City of Cape Girardeau, Missouri, including, among others the following witnesses:

M. J. Deutsch, a Federal agent or site investigator, who investigated the sites suitable and fitted for the location of a Custom House in said City of Cape Girardeau, Missouri, and reported his findings and recommendations to the Administrator of the Federal Works Agency on or about the ..... day of August, 1940, as to the merits of the sites examined as a location for the new Post Office Building and Custom House in the City of Cape Girardeau, Missouri, for the information of all agencies and persons charged with the duty of selecting a suitable site for the new Post Office Building and Custom House in said City of Cape Girardeau.

A. Arthur Tucker, Federal architect. The said A. Arthur Tucker visited the City of Cape Girardeau, Missouri, for the purpose of examining suitable locations for the construction and erection of a new Post Office Building and Custom House in said City of Cape Girardeau, and filed his report and recommendations with the Administrator of the Federal Works Agency, on or about the ..... day of October, 1940, for the information of all agencies and persons charged with the duty of selecting a suitable site for a new Post Office Building and Custom House in said City of Cape Girardeau.

H. S. Roome, liaison officer for the Commissioner of Public Buildings, Federal Works Agency, Public Buildings Administration, visited the said City of Cape Girardeau for the purpose of conferring with the Mayor and other City Officials of said City of Cape Girardeau, for the purpose of arranging and agreeing upon the procedure to be followed by plaintiff in acquiring the public buildings and public park as the location for the new Post Office Building and Custom House to be constructed and erected in said City of Cape Girardeau, Missouri. All of

[fol. 586] the reports, papers, and documents submitted by said H. S. Roome on or about the ..... day of November, 1940, were filed with the Administrator of the Federal Works Agency for the information of all agencies and persons charged with the duty of selecting a suitable site for a new Post Office Building and Custom House in said City of Cape Girardeau, which said reports were and are contrary to existing law relating to the acquisition of the property sought to be acquired by condemnation in this proceeding, and were arbitrarily and improperly made and acted upon, as alleged in the pleadings filed in the above entitled cause on behalf of the defendant, Iska W. Carmack.

(c) It is necessary for the said defendant, Iska W. Carmack, to take the testimony of witnesses whose names and addresses are unknown to either said defendant, or to L. Lee Bowman and I. R. Kelso, her attorneys of record, for the purpose of discovering certain papers to be copied or photographed to be offered in evidence by defendant on the trial of the above entitled cause, to-wit:

The person or persons who have in their custody report or reports made by Federal agents, engineers, architects, site investigators, liaison officers, and others, to-wit: the reports made by said M. J. Deutsch, A. Arthur Tucker, and H. S. Roome. The attorneys of record for plaintiff in the above entitled cause, are familiar with the reports herein referred to, and know the names of or can easily ascertain the names and addresses of the person or persons actually in possession of said reports, papers, and documents, made and filed for the use of the departments and agencies as aforesaid.

Custodian of the record of minutes of meeting held by said Federal Works Agency on or about October 24, 1940, which was attended by Harry I. Himmelberger of the City of Cape Girardeau, Missouri, relating to the selection of a site for the new Post Office Building and Custom House at Cape Girardeau, Missouri.

Custodian of the record of minutes of meeting showing the authority for the request, including all reports, papers,

and documents relating to the selection of said site, addressed to Attorney General of the United States by John N. Edy, Acting Administrator, under date of September [fol. 587] 25, 1941, requesting the Attorney General of the United States of America to cause the necessary proceedings to be instituted to condemn the public buildings and public park in the City of Cape Girardeau, Missouri, as a location for the construction and erection of a new Post Office and Custom House in the City of Cape Girardeau, Missouri.

Custodian of the record of the minutes of meeting showing the authority for the request addressed to the Attorney General of the United States by the Administrator, or Acting Administrator of the Federal Works Agency, requesting the Attorney General of the United States of America to institute the proceedings under plaintiff's (Second) Amended Petition in Condemnation, filed herein, returnable to the October Term, 1943, of the United States District Court, Eastern District of Missouri, Southeastern Division.

Witnesses whose names and addresses are unknown to either the said defendant, Iska W. Carmack, or to L. Lee Bowman and I. R. Kelso, her attorneys of record, but whose names and addresses are known or can be easily ascertained by the attorneys of record for plaintiff for the purpose of showing all reports and records made by either the representatives and agents of the Postmaster General of the United States, or of the Administrator of the Federal Works Agency connected with or relating to the matter of selecting the public buildings and public park described in plaintiff's said (Second) Amended Petition filed herein, as aforesaid, as a location for the construction and erection of a new Post Office Building and Custom House in the City of Cape Girardeau, Missouri.

L. LEE BOWMAN,
Himmelberger-Harrison Bldg.
Cape Girardeau, Mo.

I. R. KELSO,
First National Bank Bldg.
Cape Girardeau, Mo.
Attorneys for Defendant, Iska W. Carmack

Service of the above notice is hereby acknowledged, and all exceptions as to time waived by the undersigned attorneys of record for plaintiff in the above entitled cause. [fol. 588] The said attorneys of record for plaintiff also consent and agree that the depositions of witnesses shall be taken at the time and place mentioned in the above notice, or at the place or places hereafter agreed upon by the attorneys for the plaintiff and defendant, for the convenience of any witness or witnesses, particularly for the convenience of any witness who may be the custodian of any records or papers which any such witness may be requested to produce at the time of the taking of his or her deposition.

Service of copies of pleadings on behalf of defendant, Iska W. Carmack, is hereby acknowledged, including Motion to Strike Out, Demurrer, and copy of Answer to be filed, if required, after action by the Court on said Motion to Strike Out, and said Demurrer.

Signed this 20th day of October, 1943.

HARRY C. BLANTON,
U. S. Atty.

[fol. 589] (Seal)

HOWARD B. SMITH

(Seal) JOSEPH M. HALL

Subscribed, sworn to and sealed before me Nov. 22, 1943.

MARGARET C. SCOFIELD,
Notary Public

Filed Dec. 13, 1943, Jas. J. O'Connor, Clerk.

[fol. 590] Supplemental Return By Howard B. Smith Shorthand Reporter, And Joseph M. Hall, Shorthand Reporter, Of The City Of Washington, District Of Columbia,

returning herewith the following:

The letter of transmittal, the report of Post Office Inspector M. J. Deutsch, together with all exhibits, papers, documents, and enclosures referred to therein, and also copy of contract between the City of Cape Girardeau,

Missouri and the Plaintiff, herein, were delivered to Howard B. Smith and Joseph M. Hall, Shorthand Reporters by Harry J. McNerney, (one of the attorneys appearing for the Plaintiff herein at the taking of depositions) on the afternoon of November 24, 1943, at the [fol. 591] office of Howard B. Smith, Shorthand Reporter, and Joseph M. Hall, Shorthand Reporter, 601-602 Mills Building, Washington, D. C.

The delivery of said report together with all exhibits, papers, documents, and enclosures referred to therein, and also copy of contract between the said City of Cape Girardeau, Missouri, by said Harry J. McNerney, as aforesaid, was made too late to be included in the return of the shorthand reporters subscribed to and sworn to on November 22, 1943.

This supplementary return should be filed with the original return of November 22, 1943, by the Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division, in Civil Action, File No. 482, Cape Girardeau, Missouri, to be read in evidence on the trial of said cause on the part of defendant Iska W. Carmack, one of the defendants in the said cause.

Dated at Washington City, District of Columbia, November 26, 1943.

HOWARD B. SMITH,
Shorthand Reporter.

JOSEPH M. HALL,
Shorthand Reporter.

Subscribed and sworn to before me this 26th day of November, A. D. 1943.

(Seal) MARGARET C. SCOFIELD,
Notary Public

My commission expires Aug. 31, 1948.

Filed November 29, 1943, Jas. J. O'Connor, Clerk.

Filed December 13, 1943, Jas. J. O'Connor, Clerk.

[fol. 591a] (Defendant Carmack's Exhibit D-2—5/6/44.)

The Fourth Assistant Postmaster General

Washington

October 31, 1939

My dear Judge Kelso:

In accordance with the request contained in your letter of October 27, I am returning herewith the letter addressed to me by our late friend, Honorable Julien N. Friant, in behalf of the construction of a Federal building for his home town, Cape Girardeau, Missouri.

I have had a photostatic copy of the letter made and the same will be placed in our files.

I was greatly shocked and grieved when I heard of Mr. Friant's sudden death. I have known him for a number of years and I regarded him as one of the finest men with whom I have ever become acquainted; I held him in very high esteem. His passing is a great loss to all of us here.

With kind regards. I am

Sincerely yours,

SMITH W. PURDUM.

Honorable I. R. Kelso
Cape Girardeau, Missouri.

[fol. 592] (Defendant Carmack's Exhibit D-1—5/6/44.)

Department Of Agriculture

Washington

October 26, 1939.

Hon. Smith W. Purdum,
Fourth Assistant Postmaster General,
Post Office Department.

Dear Mr. Purdum:

This will introduce to you Mr. I. R. Kelso of Cape Girardeau, Missouri who is not only one of my closest personal

and political friends but also a gentleman who has devoted a life-time to the developmenut of Cape Girardeau and Southeast Missouri. He represented the Government in locating the present Post Office in our town, and is working day and night now to secure the new Post Office that you know all about for the town. I asked him to call on you and told him that you were the man who would have more to say about it than anyone else. Any courtesies shown Mr. Kelso will be greatly appreciated by me.

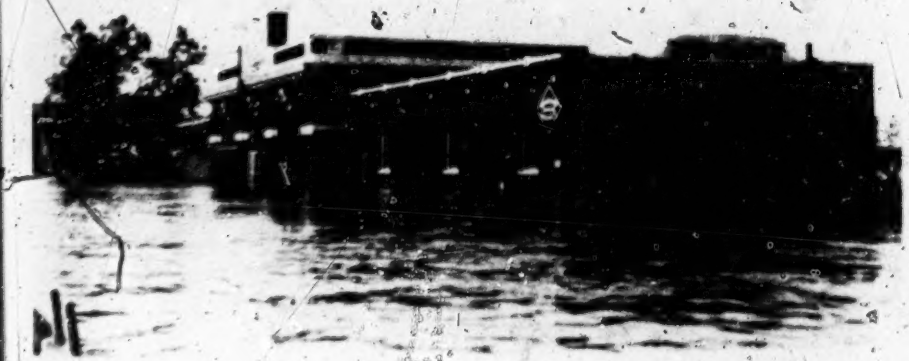
Sincerely yours,

JULIEN N. FRIANT.

(Defendants' Exhibit D, -- 4/18/44 A.P.)

(Defendants' Exhibit E, -- 4/18/44 AP.)

(Defendants' Exhibit F, -- 4/18/44 AP.)



(Defendants' Exhibit G, -- 4/18/44 AP.)

(Defendants' Exhibit H, -- 4/18/44 AP.)

(Defendants' Exhibit I, -- 4/18/44 AP.)

[fol. 599] Thereupon, at 5:15 P. M., April 18, 1944, Court was adjourned until 9:30 A. M., April 19, 1944, when the proceedings were resumed as follows:

The Court: Mr. Bowman, are you ready to proceed?

Mr. Bowman: I called Mr. Drumm for a witness and I will examine him before the other Counsel arrive. If the Court please, Mr. Kelso is here now and I will let him examine.

Edward L. Drumm of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

Direct Examination.

By Mr. Kelso:

Q. You have been sworn, have you Mr. Drumm?

A. Yes, sir.

Q. Then state your name and residence.

A. Edward L. Drumm, 834 Merriwether Street, Cape Girardeau, Missouri.

Q. What official positions have you held in the City of Cape Girardeau?

A. You mean elective, appointive, or what?

Q. Either one.

A. Well, I have been appointed Police Judge. I was appointed City Attorney. I have also served a term as Mayor of the City.

Q. How long were you Mayor?

A. I was Mayor six years, out two years and back two [fol. 600] years—eight years time altogether.

Q. That is, they were each of two-year terms?

A. Yes. sir.

Q. During the time since you went out of office you have been in the City of Cape Girardeau?

A. I have, yes, sir.

Q. Are you familiar with the different territories or areas in the town, commonly referred to as Main Street, Broadway and Good Hope Street?

A. Yes, sir.

Q. Will you as briefly as you can describe how those streets are located with respect to each other, and the extent of the business that is in each and everyone of those sections?

Mr. Cooper: We object to that, Your Honor, because that would simply go to the wisdom of the choice and would not go to the question of whether or not the choice had been made arbitrarily.

The Court: I do not know yet. I will overrule the objection at this time.

(Last preceding question was read)

A. Well, first I would mention Main Street. Main Street is one of the principal streets of our city, running in a northerly and southerly direction. It is one block west of the Mississippi River. From Broadway to Inde- [fol. 601] pendence Street, on either side of the street, might be called the principal business section of that part of town. South of Independence Street there is very little business. I think perhaps one or two small institutions. North of Broadway on either side I believe up to six or seven blocks north to the International Shoe Company on either side there is very little business. I think perhaps one or two institutions. Now that is the business feature of it. Now so far as the physical condition of the street is concerned, on the eastern side of South Main Street, south of Independence Street, there are no business houses at all, nothing but a parkway and a double drive between that section of Main Street and the passenger station of the Frisco Railroad. On the north of Broadway on Main Street, the west side of Main Street is a large bluff, a high bluff. I suspect that bluff is 75 feet. It isn't exactly perpendicular, but through the years it has been washed down. Large boulders roll down there sometimes on the street, and a vast amount of earth rolls down there with it. And they have had sidewalks and that has been covered at various times along the west side. But there are no business houses along there until you get up almost to—north of Broadway on the west side of Main Street, and then there is some small transfer business in there. And on the other side of the street there a car barn that used to be in the Missouri Utilities when they [fol. 602] operated a car service here. And on the west of the street there are two other small businesses up there. Now that is all there is between the north part of Main Street—north of Broadway. And that is all there is

on the south part of Main Street, south of Independence Street. That section of the town means just two blocks of business. And it has been that way for, oh, I have been here 35 years and more, and it has been more or less that way during that period of time. There have been some new buildings put up in there. There have been some taken down, but substantially about the same growth so far as the number of buildings. There have been some better buildings put up there than were there before. Now that is Main Street between Independence Street, south, and Broadway on the north. Now Broadway is a street running east and west, and it connects with Main Street. From Main Street, I would say west to Pacific Street, on either side of the street, there are more or less business institutions. In the first block west of Main Street on Broadway, the first two blocks are on an incline, and there are business houses along on the south side of Broadway. On the north side of Broadway in those two blocks, there is one business house; that is Dodge Motor Agency. And I believe that is all there is in that first block on the north side of Broadway. And in the next block—No, sir, the first block there is a filling station on [fol. 603] the corner between Main and Spanish Street, on the north side of Broadway, and in the second block is the Dodge Motor Agency. And I think that is the only business institution, those two institutions on the north side of Broadway between Main Street and Lorimier Street. On the south side in those two blocks, still on the incline, there are some business institutions; there are hardware stores—small business, however. And then I think there is probably maybe three or four business institutions in those two blocks from Main up to the top of the incline on Broadway. Now when you get to Lorimier Street, that is on the level, west from Lorimier Broadway runs almost level and on either side north and south of Broadway on out to Pacific Street—in fact further out, there are business houses on both sides of the street there, the ordinary business houses like mercantile establishments and this post office building located here as it is, and the office building across the street, the Marquette

Hotel, and these buildings along out this street. These are the most prominent buildings, however, and on out to Pacific Street, and west from Pacific Street on either side of the street there are more business houses; not so many on the north side. But there are a few on the south side out for two or three blocks further west. And both of these streets, Main and Independence Streets, are paved and have improved side- [fol. 604] walks on either side. And that is all about the physical description of these properties.

By Mr. Kelso:

Q. You have not described Good Hope.

A. Well, Good Hope Street; that street is about six or perhaps seven blocks south of Broadway. I don't remember—about six blocks, maybe seven blocks south of Broadway, Good Hope Street. Now Good Hope Street runs from the river west I think to the city limits on the west side. It runs east and west, and the principal business locations on that street are between Sprigg and Frederick streets. There may be a few scattered houses or business places like filling stations and bakeries probably east of Frederick Street, on Good Hope. The principal business section on that street is between Frederick and Sprigg streets. There are a few business places like filling stations, I don't think any mercantile establishments, west of Sprigg Street. I do not think there are. The hospital, however, is over there in the second block west of Sprigg Street, on Good Hope Street, the St. Francis Hospital; but the business section is between Frederick and Sprigg on either side of the street; and the structures are similar to what they are on Main Street, maybe not quite so pretentious as they are down there, and maybe not quite so good buildings, and maybe not so large, but about the same nature of business. And I think on either side of Good Hope between Frederick and Sprigg there are I think business houses all along on either side there, and [fol. 605] all kinds of business, lunch-rooms, mercantile establishments, drug stores, and things of that sort. And I think a few beer taverns may be along there, too.

Q. Have you any banks?

A. Yes, sir, there is a bank, Farmers and Merchants' Bank. That is on the west side of Sprigg Street and on the

south side of Good Hope. That is one of the principal buildings of course out there, is the Bank Building.

Q. Do you have any department stores and offices?

A. I beg your pardon.

Q. Do you have a department store over there—Hirsch?

A. Yes, sir; he has a general line of merchandise, groceries and drygoods, and then I think some small articles of hardware probably. He has a pretty good size store there.

Q. Now before going further, will you describe Spanish Street, its location?

The Court: Hasn't that been gone into by the witnesses yesterday?

Mr. Kelso: I do not think so.

The Court: Well, let's make it short. I do not think that is getting very close to the case.

By Mr. Kelso:

Q. Go ahead.

A. Spanish Street is a street that runs north and south in the City of Cape Girardeau, one block west of Main Street. And there is very little business on Spanish [fol. 606] Street; we will say from Broadway south to Independence, there are houses on the east side in two blocks there. I think some of the Government buildings are in there. That is where they are having some Government departments. And I think there is a dress factory down there, too, on Spanish Street. And the Employment Agency I think probably is located in there, or was. And on the west side of Spanish Street is the Court House Park. That is the beginning of the terrace on the west side of Spanish Street, between Broadway and Independence.

Q. Mr. Drumm, I have no record, I think in here, of the Library. Will you as briefly as you can describe the Library?

A. You mean the physical structure of the Library Building itself? Well, the Library Building is, I would say west or southwest of the court house down here, our City Hall. It is now in the Court House Park. That Library has been, I think it was put there in 1919 with the Carnegie Foundation Fund, I think it was established,

and it is maintained by tax on the people of the City as a regular Library tax assessed for the maintenance of the Library, and has been ever since it has been there. And there are conditions, however, I do not want to probably go into that, just the details of that. But it is a brick building, it is one-story. It has, I think, complete basement and has several thousand volumes of books and is a very prominent, important place for people to go to spend their time reading and getting books from that Library. [fol. 607] The basement of it is used for various purposes.

Q. How far is it from this Post Office Building to the business center of Good Hope Street, the Bank?

Mr. Cooper: Object to that as calling for a conclusion of the witness, the business center of Good Hope Street.

Mr. Kelso: I said to the Bank.

Mr. Cooper: That is all right then, if you want to fix it to the Bank.

A. To the Farmers & Merchants' Bank?

Q. Yes, sir.

A. Well, I will have to count the blocks.

Q. All right.

A. About eight blocks, something like that, maybe nine, eight or nine blocks west, and then south.

Q. How far is it from this point to the St. Charles Hotel, on the corner of Themis and Main Street?

A. Three blocks, I think. May I correct my statement about to the St. Charles Hotel? It is four blocks.

Q. Are you familiar with the description of the property in this condemnation proceeding?

A. Well, is it what we ordinarily call the Court House and the Court House property?

Q. Yes, sir; what we call the Court House and Library property.

A. Yes, sir; I am acquainted with it.

[fol. 608] Q. Now are you familiar with the proposed location of the new Custom House and Post Office Building?

A. I am.

Q. And you are also familiar with the location of the site commonly referred to as Themis Street or Green property site? A. Yes, sir.

Q. And of course, familiar with the present site?
A. Yes, sir.
Q. Is there any necessity or any reason that you know of, or anything that you know of that would make it necessary to destroy the Library Building and the Court House in order to secure a site for the new post office?

Mr. Blanton: Your Honor please, we object to that as calling for a conclusion of the witness, not being material to any of the issues in controversy here, and not binding upon the party who was selected to select a post office site.

The Court: I do not think so, and I do not think this testimony would be superior to the report of the investigator. It is not disputed about several sites where the post office they propose to build could be erected.

Mr. Kelso: The only thing I want to show by the witness is that the present site and the Green site are available and fitted for a post office site.

The Court: Nothing here but what that is a fact, on the report of the inspector.

[fol. 609] Mr. Blanton: Yes, sir; it shows he considered 22 sites.

Mr. Kelso: That is all.

Cross-Examination.

By Mr. Blanton:

Q. Mr. Drumm, your wife owns this strip of land just immediately south of the present post office site, doesn't she?
A. She does not.
Q. Who is Ella Drumm?
A. That is my wife.
Q. It is in her name?
A. Yes, sir; but she has sold that property.
Q. When did she sell it?
A. Oh, that has been some year or two ago.
Q. It was submitted in her name, the offer, was it not?
A. I think probably it was.
Q. You submitted the offer, didn't you?
A. I think maybe that is right.

Q. Don't you know whether it is or not?

A. I sure don't remember. I submitted more than one of the sites. I submitted more than one site, but I think probably I did submit that. I think that is right.

Q. In which you asked a thousand dollars for a 9-foot strip immediately south of the present post office site?

A. I think that is what was asked for it.

Q. Now Mr. Drumm, the proposed site located on what [fol. 610] is known as the Court House Park Square, is in a block immediately adjoining the block in which the present post office site is located, isn't it?

A. Yes, sir.

Mr. Kelso: Under the circumstances, Your Honor, with the action of the Court, I think that is incompetent cross examination.

The Court: There is not any question about it. Go ahead.

Q. I will ask you how far the rear end, that is the south end of the Missourian Building, is from the site in condemnation?

A. Well, it is the width of that street, I think Mr. Blanton. I think probably the width of the street from the extreme south corner of the Missourian Building or property, just the width of the street, of Lorimier Street.

Q. In other words, this is a good deal closer to the proposed site than the Missourian Building is to the present site, isn't it?

A. What is closer?

Q. The site in condemnation.

A. Closer to the Missourian Building than this building?

Q. Yes, sir.

A. Yes, sir; it is.

Q. Now you testified for Judge Kelso that the Farmers & Merchants' Bank which is at the southwest corner of [fol. 611] Sprigg and Good Hope, was eight or nine blocks from the present site?

A. That is my best judgment. I just didn't count it. I figure something like that.

Q. If you go out Themis Street it would be the same distance, wouldn't it, from the site in condemnation?

A. Yes, sir; to Sprigg Street, same distance as that.

Q. Now you testified, if I understood you correctly, that south of Independence Street on Main Street there is not any business except the Frisco depot. Did I understand you correctly?

A. No, sir; I don't think I testified that. I said there may be a few scattering businesses down there.

Q. Well, there is a garage, isn't there?

A. There is a garage, yes, sir, and a Firestone station, filling station, and I think some automobile supplies and accessories.

Q. A Jewish synagogue, isn't there?

A. Yes, sir, and Catholic Church.

Q. And isn't there a wholesale grocery down there, too?

A. At the extreme end of Main Street.

Q. Now there is quite a business section on the street that faces the river there, too, isn't there, in that section extending from Independence Street north?

A. You mean from Independence Street up to Broadway?

[fol. 612] Q. Yes, sir.

A. Yes, sir, there are business houses along there facing the river.

Q. And there are business houses on Independence Street from Broadway—I mean from Main Street west, are there not? A. Yes, sir.

Q. And there are business houses on Spanish Street from Independence south, are there not?

A. Yes, sir; there are a few in there, yes, sir, that is right.

Q. Now this high bluff you spoke of on Main Street, being north of Broadway, that only extends for a very short distance, doesn't it?

A. I think almost a whole block.

Q. Well, there are many blocks that are used for business houses of one kind or another on both sides of the street, north of Broadway on Main Street, are there not?

A. There are some houses on the east side, there is a lumber company on the east side along there, and I think a filling station and probably a boat station up to I would say the second block north on the east side of Main Street.

Q. Now what business is there on the west side of Main Street north of Broadway?

A. There is a filling station on the corner of Main and Broadway on the west side, and next there is a foundry in [fol. 613] in there that has been there for a number of years. And north of that now there is not anything, except up that way, I do not know just how far, probably almost a block, there is an auto parts company in there, a little small business selling auto parts.

Q. And the International Shoe factory is up there?

A. That is in the extreme, that is up I think four blocks or more above there.

Q. They are the biggest employers in the city, are they not?

A. I think maybe they are.

Q. You know they are, don't you, as former mayor of the City?

A. No, sir, I don't know it; I think they are.

Mr. Blanton: That is all.

Mr. Kelso: Your Honor, since the Court has called attention to the fact as to these other sites already being in the record, available sites, I want to say that these were the things I wanted to prove by some of these witnesses, and I will excuse them. Now Mr. Frank Finney won't be used for that reason, and Mr. Ray Beckman, the present Mayor, will not be used for the same reason; and Mr. Carpenter will not be used because of that. The proof of that is what I am showing by these people, that these sites were [fol. 614] available and fitted for the purpose.

The Court: I think that is in the record.

Mr. Kelso: All right, I won't take up the time on that, but those witnesses will be excused.

Herman Bremermann of lawful age, produced, sworn and examined, testified on behalf of defendants as follows:

Direct Examination.

By Mr. Hall:

Q. State your name, please.

A. Herman Bremermann.

Q. You were sworn were you, Mr. Bremermann?
A. Yes, sir.
Q. Where do you reside?
A. Right next to the post office on the east.
Q. In Cape Girardeau, Missouri?
A. Yes, sir.
Q. How long have you lived in Cape Girardeau?
A. Sixty-five years, except the few years that I was South.
Q. What business have you been engaged in while a resident of Cape Girardeau?
A. Well, I have been with the First National Bank thirty-five years and six months.
Q. In what capacity?
[fol. 615] A. Since 1924 I was cashier.
Q. Are you still connected with the bank?
A. Only as director. I resigned in March.
Q. You resigned as cashier of the First National Bank in March of this year?
A. Yes, sir.
Q. And for years preceding that you had been an employee of that bank?
A. Yes, sir.
Q. As cashier or in other capacities?
A. Yes, sir.
Q. The First National Bank is located on what street in Cape Girardeau?
A. Main Street.
Q. How long has it been on that street?
A. Ever since the existence of the bank.
Q. Is I. R. Kelso, who is one of the attorneys for the defendant Carmack in this case, a director of that bank?
A. No, sir.
Q. Is he a stockholder in that bank?

Mr. Blanton: I don't see why that makes any difference, whether he is or not. We object to encumbering the record.

The Court: What is the purpose of this?

Mr. Hall: The purpose, Your Honor, is to show that [fol. 616] there are persons who are interested in that bank who are interested in this site location and are not in favor of the location that is sought to be condemned in this suit.

The Court: You had an election here, I suppose?

Mr. Blanton: Mr. Kelso is not a witness in the case, and ostensibly he appears as Counsel for Carmack.

The Court: Objection sustained.

Mr. Hall: May I make an offer?

The Court: Certainly.

Mr. Hall: The defendant Carmack offers to prove by this witness that I. R. Kelso who appears as Counsel in this case and who was [refered] to in the testimony yesterday by the Government witness Walter Meyer as having appeared before the Joint Committee, testified about it, is a large stockholder in the First National Bank that has been referred to by the witness.

Mr. Blanton: To which offer we renew the objection heretofore made. The Court assumes Judge Kelso has a perfect right to appear on either side of the issue if he so desires. It is not necessary to explain, as far as his appearing is concerned. He has a perfect right to do that. It attaches no improper motive one way or the other for his appearance.

The Court: Sustained.

By Mr. Hall:

Q. Mr. Bermermann, you stated that you live in the residence situated immediately east of this present post office and court house site? Is that correct?

[fol. 617] A. Yes, sir.

Q. About what is the distance from the east line of this post office building that we are in, to your property line?

A. It adjoins my property.

Q. Well, the building adjoins your property?

A There is about a 30 foot space.

Mr. Cooper: You asked him the east line of the property.

Mr. Hall: No, sir, just the building on which this post office is located. Let me frame that again.

Q. About what is the distance between the east line of this post office building and the west line of your property?

A. There is about 30 feet, I would judge.

Q. A vacant space there?
A. Yes, sir.
Q. And then your property extends on to the east along the south side of Broadway? Is that correct?
A. Yes, sir.
Q. And what is the frontage of your property on Broadway?

Mr. Blanton: Your Honor, that is all in the record in this report from the Agent Deutsch. It shows the dimensions of all these properties and shows the property of Mr. Bremermann was among those considered.

The Court: I think so, but I will let him proceed a little further. I do not know yet what the purpose may be.

[fol. 618] A Ninety-three feet and five tenths (93.5 ft.).
Q. And that property extends what distance south from Broadway?
A. 173.5 feet south.
Q. Are you the Mr. Bremmermann who offered that property as an available site in connection with this existing post office site, for the location of a new post office building in Cape Girardeau?
A. Yes, sir.
Q. You are still the owner of that property?
A. Yes, sir.
Q. Are you still willing that that property may be taken at the price you submitted, for the location of a new post office site in connection with this present post office site?
A. Yes, sir.
Q. Now Mr. Bremermann, are you familiar with what is called the Court House Park here in Cape Girardeau?
A. Yes, sir.
Q. You know that the Library Building is located on that Court House Park site, do you?
A. Yes, sir.
Q. Is there any other public library in the City of Cape Girardeau?
A. None that I know of, outside of the Southeast Missouri State Teachers' College has a library.

[fol. 619] Q. That is, the State Teachers' College has a library in connection with the College?
A. Yes, sir.
Q. About what is the population of Cape Girardeau?

Mr. Blanton: That also is in the record, Your Honor. They testify to the population for the last four censuses.

The Court: I will overrule it at the time. Let's get along.

Q. About what is the population of Cape Girardeau?
A. Between 19,500 I believe, just in round numbers, 19,500.

Mr. Hall: You may inquire.

Mr. Blanton: No questions.

W. C. KAEMPFER of lawful age, produced, sworn and examined, testified on behalf of defendants as follows:

Direct Examination.

By Mr. B[redacted]

Q. [redacted]?
A. W. C. [redacted]pfer.
Q. What is your business in connection with the City of Cape Girardeau?
A. City Clerk.
Q. And have you the Minute Book No. R that contains [fol. 620] reference with reference to this?
A. Yes, sir.
Q. All right, will you get that, please?

(Witness procures a book and returns to witness stand)

Q. Now will you find the minutes of the procedure from the 26th day of November, 1940?
A. The 26th, all right.
Q. Will you read the reference there with respect to the resolution or ordinance that was passed on that date, or introduced on that date at least?
A. "There was then given the first, second and third readings of resolution authorizing the Mayor of the City of Cape Girardeau, Missouri, to execute offer to exchange property with the Unite[d] States of America."

Mr. Cooper: What is the page, Mr. Kaempfer?

A. 41.

Mr. Blanton: What is the number of the resolution?

A. The resolutions are not numbered, Mr. Blanton; it is page 41.

By Mr. Bowman:

Q. Is the resolution on that page?

A. No, sir.

Q. Have you the resolution?

A. No, sir. No, I only brought the three ordinances that I was requested to bring over. I don't remember the resolution.

[fol. 621] Mr. Bowman: Is there any objection to sending down to the City Clerk for the resolution or ordinance that you called attention to?

Mr. Cooper: We would like to see it first. We may have a photostatic copy of it here.

Mr. Bowman: I think you have.

Mr. Kelso: Excuse him and let him get it.

The Court: Is there any dispute about the resolution?

Mr. Kelso: I don't know. They said they wanted to see it, they have a certified copy of it.

Mr. Cooper: We don't know whether we do or not.

The Court: What are you offering now, Judge?

Mr. Bowman: I am offering that ordinance that was passed on November 26th.

The Court: Do you have a copy of the ordinance with you?

Mr. Blanton: He is talking about a resolution. I was talking about an ordinance.

Mr. Bowman: This is called Resolution and Ordinance.

The Court: Let's get definitely what it is you are asking this witness for.

Mr. Bowman: Let me ask this question: Is it the same as Ordinance No. 905?

A. I gather that that resolution was embodied in Ordinance No. 905.

Mr. Blanton: We have Ordinance 905, and I have no [fol. 622] objection to that.

Mr. Cooper: That resolution of November 26, 1940, is in connection with this Site Proposal, and already in the record and offered by us.

Mr. Bowman: I am mighty glad to know that. I wanted it in. All right, if that is in the record it is all right. I do not need to introduce it now if it is in.

Now then—

The Court: What exhibit is that?

Mr. Cooper: This is another copy than the one we used. It is Exhibit 2, Your Honor. That is the Site Proposal, and attached to it is resolution authorizing the execution.

The Court: Exhibit 2 includes resolution of the City Council of the City of Cape Girardeau?

Mr. Cooper: Yes, sir.

The Court: And the ordinance?

Mr. Blanton: No, sir, it doesn't include the ordinance, that is a separate document. The ordinance is 905 and 906.

The Court: If you want to introduce the ordinance I suggest you ask Counsel for it, and he will probably let you have it.

Mr. Blanton: I will be glad to do it.

Mr. Cooper: We expect to introduce it in rebuttal, Your Honor. We would be glad for him to introduce it now, it will save us the time.

[fol. 623] Mr. Bowman: If I may take this and read the minutes that I want made a matter of record.

Mr. Blanton: Here is 905 and 906 (handing papers to defendants' Counsel)

Mr. Bowman: It isn't necessary to read all that, is it?

The Court: No, sir.

Mr. Blanton: Attached to this exhibit, Judge, is also a copy of the letter from the Mayor enclosing those two

things, and also the result of the election which was held here on the selection of the post office site, a certified copy.

Mr. Bowman: This has already been introduced?

Mr. Blanton: No, it has not.

Mr. Bowman: I would be glad to have all those things, if I may introduce this. (The papers are marked "Defendant's Exhibit J")

The Court: Are you offering that last exhibit?

Mr. Bowman: Yes, sir.

The Court: You are now offering Defendant's Exhibit J?

Mr. Bowman: That is it, "Defendant's Exhibit J", that is right.

[fol. 624] (Defendants' Exhibit J, — 4/19/44 AP.)

Cape Girardeau, Mo.
P.O., CT.H., ETC. (NEW)
12/1/43

I hereby certify that the annexed papers (15 sheets) are true photostatic copies of a letter from Hinkle Statler, Mayor, City of Cape Girardeau, Mo., addressed to Honorable Walter A. Myers, Fourth Assistant Postmaster General on March 6, 1941, together with enclosures, as follows: Certified copies of Ordinances Nos. 905 and 906 of the Council of the City of Cape Girardeau authorizing the Mayor to complete the exchange of properties with the Government in regard to the Post Office, Court House, etc., site in the City of Cape Girardeau and calling for a special election upon the proposition as to whether or not the ordinance authorizing the trade should be adopted, and certification of W. C. Kaempfer, City Clerk, as to the vote polled at the Special Election held in the City of Cape Girardeau, Missouri, Tuesday, March 4, 1941, the originals of which are on file in the Federal Works Agency.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on this 2nd day of December, 1943.

Seal
Federal Works Agency
United States of
America.

By direction of the
Federal Works Administrator.

ALAN JOHNSTONE
General Counsel,
Federal Works Agency.

[fol. 625] Commissioners

Raymond E. Beckman
Supt. Department of Accounts and Finance and Parks and Public Property.

Philip H. Steck
Supt. Fire Department and Department of Public Safety.

Frank Batchelor
Supt. Department of Streets and Public Improvements.

Albert Schultz
City Treasurer.

R. B. Oliver, II,
City Atty. & Counsellor.

John R. Walther,
City Engineer.

E. W. Barenkamp,
Chief of Police.

Paul E. Kaiser,
Police Magistrate.

C. C. Summers,
Health Officer.

Carl Lewis,
Fire Chief.

W. C. Blair,
City Assessor.

J. W. McCullough,
Street Commissioner.

City of Cape Girardeau, Mo.
Commission Form
Hinkle Statler, Mayor
Superintendent Department of Public Affairs
Wm. C. Kaempfer, City Clerk
Verna Lee Landis, Deputy City Clerk
March 6, 1941

Honorable Walter A. Myers
Fourth Assistant Postmaster General
Washington, D. C.

Dear Mr. Myers:

I am enclosing certified copies of Ordinances No. 905 and 906 of the City of Cape Girardeau, which ordinances authorize me to complete the exchange of properties with the Government in regard to the Post Office site in the City of Cape Girardeau and calling for a special election upon the proposition as to whether or not the ordinance authorizing the trade should be adopted.

I am also enclosing herewith certification of the City Clerk as to the results of the City Election. You will note from this certification that the proposition carried, and that I have now the authority, not only from the City Council, but from the people of Cape Girardeau, to complete the exchange of properties with the Government in order that the new Post Office building can be constructed in Cape Girardeau as soon as possible.

You will note that in the Ordinance calling the special election, a list of judges is provided for. A number of these judges were unable to serve and substitutions were made. The majority of these substitutions were furnished by those opposing the trade, and I might add that the original list of judges also contained the names of numerous opponents to the trade proposal.

Very respectfully,

HINKLE STATLER
Mayor

HS MC
Enc.

[fol. 626] Ordinance No. 905

An Ordinance Authorizing And Directing The Mayor Of The City Of Cape Girardeau, Missouri To Execute An Offer To The United States Of America To Exchange Certain Property Owned By The City Of

Cape Girardeau For Property Owned By The United States Of America In The City Of Cape Girardeau, Missouri, And Authorizing The Mayor To Execute Such Instruments As May Be Necessary To Consummate The Exchange Of Said Property Should Said Offer Be Accepted

Whereas, on July 15, 1940 the Council of the City of Cape Girardeau authorized and directed the Mayor and City Clerk to execute an offer to exchange property with the United States of America, and

Whereas, after negotiations between the City and the United States of America, the United States of America indicated that it would accept the offer to exchange properties as submitted by the City of Cape Girardeau, and

Whereas, on the 4th day of December, 1940, a Resolution was passed and adopted by the City Council of Cape Girardeau authorizing the Mayor to submit a formal offer to exchange properties with the United States of America, which offer was transmitted to the United States of America, and

Whereas, The City Council was thereafter advised that said offer could not be accepted due to an executive order issued by the Bureau of the Budget of the United States of America, pursuant to a proclamation by the President of the United States, and

Whereas, having been advised that said exchange could not be effected, the City Council did, on the 7th day of December, 1940, rescind said Resolution passed on the 4th day of December, 1940, and

Whereas, the City of Cape Girardeau has now been advised that there is a likelihood that the City can secure the $430,000. Post Office and Federal Court building for the City of Cape Girardeau upon the renewal of said offer to exchange property, and

[fol. 627] Whereas, the Council is now fully informed and deems it to be to the best interest of the City and in furtherance of the general welfare thereof to renew said offer to exchange property whereby the City is to convey a parcel of the property now owned by the City to the United States of America for the purpose of constructing

thereon a Post Office and Federal Court building, and to accept in exchange therefor the parcel of land and building thereon now owned by the United States of America, and used as the present Post Office and Federal Court building.

Now, Therefore, Be It Ordained By The Council Of The City Of Cape Girardeau, Missouri, As Follows:

Section 1: That the Mayor and City Clerk be authorized and directed to execute for and in behalf of the City of Cape Girardeau an offer to convey to the United States of America the following described parcel of land, to-wit:

A tract of ground in the City and County of Cape Girardeau, Missouri, described as follows:

Begin at a point on the east line of Lorimier Street, said point being 100.0 feet north of the intersection of the east line of Lorimier Street and the center line of Themis Street extended; thence South 82° 59′ E., and parallel to the center line of Themis Street extended, 240.0 feet; thence South 6° 58′ W., and parallel to the east line of Lorimier Street 280.0 feet; thence North 82° 59′ W., and parallel to the center line of Themis Street extended, 240.0 feet to the east line of Lorimier Street; thence North 6° 58′ E., along the east line of Lorimier Street 280.0 feet to the point of beginning.

Section 2: The conveyance of said property shall be for the purpose of having constructed thereon by the United States of America a Post Office and Federal Court building.

Section 3: That in exchange therefor and in consideration for the conveyance by the City, the United States of America shall convey title to and the City of Cape Girardeau shall accept the following described parcel of land [fol. 628] and building thereon now owned by the United States of America, to-wit:

Begin at the southeast corner of the intersection of Broadway and Fountain Streets in the City of Cape Girardeau, and measure along the south side of Broadway Street 125 feet and five inches; thence south, parallel with east line of Fountain Street 165.175 feet to an alley; thence west along the north side of said alley 125 feet

and five inches to the east line of Fountain Street; thence north along the east line of Fountain Street 165.175 feet to place of beginning, all located in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri.

Section 4: That said property to be accepted by the City of Cape Girardeau from the United States of America shall be for the uses and purposes of the City of Cape Girardeau, Missouri, and the County of Cape Girardeau, Missouri for the Common Pleas Court, the City of Cape Girardeau, however, to hold title in fee simple.

Section 5: The Mayor and City Clerk are hereby directed to make and file an application with the United States of America to continue the use of the building now being used for library purposes upon the payment of a monthly rental therefor of One Dollar ($1.00) per month for such period of time as may be consistent with the policy and requirements of the United States of America.

Section 6: In the event the above authorized offer is accepted by the United States of America, the Mayor and City Clerk are hereby authorized and directed to execute such instruments as may be necessary to consummate and complete the exchange of said property for the purposes aforesaid.

Passed and approved this 11th day of February, 1941.

HINKLE STATLER
Mayor

Attest:

W. C. KAEMPFER,
City Clerk

I, W. C. Kaempfer, City Clerk of the City of Cape Girardeau, Missouri, do hereby certify that the above and foregoing is a true and correct copy of Commission Form Ordinance No. 905, passed and approved on the 11th day of February, 1941.

In witness whereof I hereunto set my hand and affix the seal of the City of Cape Girardeau, Missouri, this 5th day of March, 1941.

W. C. KAEMPFER,
City Clerk.

(Seal)

[fol. 629] Ordinance No. 906

An Ordinance Calling A Special Election For The Purpose Of Testing The Sense Of The Qualified Voters Of The City Of Cape Girardeau, Missouri On An Ordinance Known As Commission Form Ordinance No. 905 Whereby It Is Proposed That The City Of Cape Girardeau Offer To Convey And Convey To The United States Of America Certain Property On Which The United States Shall Build A Post Office And Federal Court Building, In Exchange For A Deed From The United States Of America To The City of Cape Girardeau Conveying The Property Now Owned By The United States In Said City Known As The Present Post Office Property; Designating The Time Of Said Special Election And The Places At Which It Shall Be Held: Appointing The Judges Of Said Election: Prescribing The Manner Of Holding Said Election, The Form Of the Ballot, And The Form Of The Notice Of Said Election And Directing Its Publication

Whereas, the City Council of the City of Cape Girardeau, Missouri did, on the 11th day of February, 1941, pass and approve Commission Form Ordinance No. 905, which Ordinance in the very words and figures thereof is as follows:

Ordinance No. 905

An Ordinance Authorizing And Directing The Mayor Of The City of Cape Girardeau, Missouri To Execute An Offer To The United States Of America To Exchange Certain Property Owned By The City Of Cape Girardeau For Property Owned By The United States Of America In The City Of Cape Girardeau, Missouri, And Authorizing The Mayor To Execute Such Instruments As May Be Necessary To Consummate The Exchange Of Said Property Should Said Offer Be Accepted

Whereas, on July 15, 1940 the Council of the City of Cape Girardeau authorized and directed the Mayor and City Clerk to execute an offer to exchange property with the United States of America, and

Whereas, after negotiations between the City and the United States of America, the United States of America indicated that it would accept the offer to exchange properties as submitted by the City of Cape Girardeau, and

Whereas, on the 4th day of December, 1940, a Resolution was passed and adopted by the City Council of Cape Girardeau authorizing the Mayor to submit a formal offer to exchange properties with the United States of America, which offer was transmitted to the United States of America, and

[fol. 630] Whereas, the City Council was thereafter advised that said offer could not be accepted due to an executive order issued by the Bureau of the Budget of the United States of America, pursuant to a proclamation by the President of the United States, and

Whereas, having been advised that said exchange could not be effected, the City Council did, on the 7th day of December, 1940, rescind said Resolution passed on the 4th day of December, 1940, and

Whereas, the City of Cape Girardeau has now been advised that there is a likelihood that the City can secure the $430,000. Post Office and Federal Court building for the City of Cape Girardeau upon the renewal of said offer to exchange property, and

Whereas, the Council is now fully informed and deems it to be to the best interest of the City and in furtherance of the general welfare thereof to renew said offer to exchange property whereby the City is to convey a parcel of the property now owned by the City to the United States of America for the purpose of constructing thereon a Post Office and Federal Court building, and to accept in exchange therefor the parcel of land and building thereon now owned by the United States of America, and used as the present Post Office and Federal Court Building.

Now, Therefore, Be It Ordained By The Council Of The City Of Cape Girardeau, Missouri, As Follows:

Section 1: That the Mayor and City Clerk be authorized and directed to execute for and in behalf of the City of

Cape Girardeau an offer to convey to the United States of America the following described parcel of land, to-wit:

A tract of ground in the City and County of Cape Girardeau, Missouri, described as follows: Begin at a point on the east line of Lorimier Street, said point being 100.0 feet north of the intersection of the east line of Lorimier Street and the center line of Themis Street extended; thence south 82° 59′ E., and parallel to the center line of Themis Street extended, 240.0 feet; thence South 6° 58′ W., and parallel to the east line of Lorimier Street 280.0 feet; thence North 82° 59′ W., and parallel to the center line of Themis Street extended, 240.0 feet to the east line of Lorimier Street; thence North 6° 58′ E., along the east line of Lorimier Street 280.0 feet to the point of beginning.

Section 2: The conveyance of said property shall be for the purpose of having constructed thereon by the United States of America a Post Office and Federal Court building.

Section 3: That in exchange therefor and in consideration for the conveyance by the City, the United States of America shall convey title to and the City of Cape Girardeau shall accept the following described parcel of land and building thereon now owned by the United States of America, to-wit:

Begin at the southeast corner of the intersection of Broadway and Fountain Streets in the City of Cape Girardeau, and measure along the south side of Broadway [fol. 631] Street 125 feet and five inches; thence south, parallel with east line of Fountain Street 165.175 feet to an alley; thence west along the north side of said alley 125 feet and five inches to the east line of Fountain Street; thence north along the east line of Fountain Street 165.175 feet to place of beginning, all located in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri.

Section 4: That said property to be accepted by the City of Cape Girardeau from the United States of America shall be for the uses and purposes of the City of Cape Girardeau, Missouri, and the County of Cape Girardeau,

Missouri for the Common Pleas Court, the City of Cape Girardeau, however, to hold title in fee simple.

Section 5: The Mayor and City Clerk are hereby directed to make and file an application with the United States of America to continue the use of the building now being used for library purposes upon the payment of a monthly rental therefor of One Dollar ($1.00) per month for such period of time as may be consistent with the policy and requirements of the United States of America.

Section 6: In the event the above authorized offer is accepted by the United states of America, the Mayor and City Clerk are hereby authorized and directed to execute such instruments as may be necessary to consummate and complete the exchange of said property for the purposes aforesaid.

Passed and approved this 11th day of February, 1941.

Attest:

W. C. KAEMPFER, City Clerk. HINKLE STATLER, Mayor.

and

Whereas, the City Council of said City is now advised that there is a likelihood of securing for the City a Post Office and Federal Court Building, provided the exchange or trade of properties as proposed in the above ordinance is effected, and

Whereas, the City Council believes that if said exchange or trade cannot be effected between said City and the United States of America, the construction of a Post Office and Federal Court Building in said City will be indefinitely delayed, and

Whereas, the Council is of the opinion that the taxpayers of the City of Cape Girardeau can and will be saved a large sum of money and secure a well constructed building for its use and service as a City Hall, if said exchange of properties is made; and

Whereas, the City Council is of the opinion that the majority of the qualified voters of said City are in favor of the exchange or trade as is provided for in the above

set-out ordinance, but realizing that there may be qualified voters who are opposed to said exchange or trade, the City [fol. 632] Council now deems it advisable to call a special election for the purpose of testing the sense of the qualified voters upon the proposition whereby it is proposed that the City exchange or trade property with the United States of America, whereby the United States shall secure a site for the construction of a new Post Office and Federal Court building, and the City of Cape Girardeau shall secure the present Post Office and Federal Court building for use as a City Hall and Common Pleas Court.

Now, Therefore, Be It Ordained By The City Council Of The City Of Cape Girardeau, Missouri, As Follows:

Section 1: That a special election be and the same is hereby called and ordered to be held in the City of Cape Girardeau, Missouri on Tuesday, the 4th day of March, 1941, for the purpose of testing the sense of the qualified voters of said City upon the following proposition:

Proposition

The City of Cape Girardeau shall, through the proper officials, offer to convey and convey if said offer be accepted a portion of what is commonly known as Courthouse Park owned by said City, to the United States of America for the purpose of constructing thereon a Post Office and Federal Court building to cost approximately $430,000, and shall receive in exchange and trade therefor the property known as the present Post Office and Federal Court site in said City, the building thereon to be used for City purposes and as a Common Pleas Courthouse. Such exchange and trade shall be done in accordance with Commission Form Ordinance No. 905, passed and approved on the 11th day of February, 1941, which ordinance specifically describes the parcels of land to be exchanged and to which reference is made for a more specific description.

Section 2: That the polling places for said special election shall be the following:

Ward 1 — Courthouse
Ward 2 — Police Station
Ward 3 — Trinity Lutheran Hall
Ward 4 — Fairground Park.
Ward 5 — J. C. Cole Store

[fol. 633]

Ward 6 — Salvation Army Hall
Ward 7 — Evangelical Church
Ward 8 — Maple Avenue Church
Ward 9 — Meyer's Store
Ward 10 — Pentecostal Church

Section 3: The following named persons shall be and the same are hereby appointed judges of said special election, who shall also perform the duties of clerks of election:

Ward 1	Raymond H. Brady
	Frank Finney
	Edward Bauerle
	Norman Stroder
Ward 2	C. A. (Andy) Juden
	Richard Behrens
	C. C. Harris
	H. A. Nussbaum
Ward 3	James A. Kinder
	Barrett Cotner
	Carl Meyer
	Willard Estes
Ward 4	Manning Greer
	James A. Finch, Jr.
	Leo Rasche
	Thad Stubbs
Ward 5	Albert Smith
	Rev. Walt Hill
	J. C. Cole
	Roy Mahy

[fol. 634]

Ward 6	Morton Thompson
	Mac Hunter
	Robert Thomas
	Ben M. Green
Ward 7	Tom Simpson
	Clarence Suedekum
	Chas. N. Cofer
	W. D. Deevers

Ward 8	Alfred G. Hirsch
	A. A. Vogel
	Frank Carter
	Roy Griffaw
Ward 9	Champ Neville
	Edw. Vogel
	John C. Hostler
	Jack Knehans
Ward 10	Roy Hamilton
	Fred Kelley
	B. Z. Wyatt
	Everett Moore

Section 4: That the City Clerk be, and he is hereby directed to publish in The Southeast Missourian, a daily newspaper published in the City of Cape Girardeau, Missouri; and in the Cape Girardeau News, a weekly newspaper published in said City, a notice of the holding of said special election. Said notice shall be published in substantially the following form and manner.

[fol. 635] Notice Of Special Election

Whereas, The City Council of Cape Girardeau, Missouri did, on the 11th day of February, 1941, duly adopt Commission Form Ordinance No. 905, an exact copy of which is as follows:

(Here set out exact copy of this Ordinance).

Now, Therefore, Notice is hereby given that on the 4th day of March, 1941, a special election will be held in said City to test the sense of the qualified voters of said City upon the following proposition:

Proposition

The City of Cape Girardeau shall, through the proper officials, offer to convey, and convey if said offer be accepted, a portion of what is commonly known as Courthouse Park owned by said City, to the United States of America for the purpose of constructing thereon a Post Office and Federal Court building to cost approximately $430,000, and shall receive in exchange and trade therefor the property known as the present Post Office and Federal

Court site in said City, the building thereon to be used for City purposes and as a Common Pleas Courthouse. Such exchange and trade shall be done in accordance with Commission Form Ordinance No. 905, passed and approved on the 11th day of February, 1941, which ordinance specifically describes the parcels of land to be exchanged and to which reference is made for a more specific description. The polling places for said election will be as follows:

Ward 1 — Courthouse
Ward 2 — Police Station
Ward 3 — Trinity Lutheran Hall
Ward 4 — Fairground Park
Ward 5 — J. C. Cole Store
Ward 6 — Salvation Army Hall
Ward 7 — Evangelical Church
Ward 8 — Maple Avenue Church
Ward 9 — Meyer's Store
Ward 10 — Pentecostal Church

The polls at said election will be open on the date mentioned above at each of said polling places from 6 A. M. to 7 P. M.

Done by order of the City Council of the City of Cape Girardeau, Missouri, this 11th day of February, 1941.

W. C. KAEMPFER,
City Clerk.

The aforesaid notice shall be inserted in the daily paper aforesaid once, said insertion to be not more than twenty [fol. 636] (20) nor less than five (5) days before said election. Said notice shall be inserted in the weekly paper aforesaid once, said insertion to be not more than twenty (20) nor less than five (5) days before said election.

Section: 5: In addition to the notice provided for in the foregoing section, the City Clerk shall publish for seven (7) successive issues of the daily newspaper, as aforesaid, the following notice:

Notice Of Special Election

Notice is hereby given that on the 4th day of March, 1941 a special election will be held in the City of Cape Girardeau to test the sense of the qualified voters of said City upon the following proposition:

Proposition

The City of Cape Girardeau shall, through the proper officials, offer to convey, and convey if said offer be accepted, a portion of what is commonly known as Courthouse Park owned by said City, to the United States of America for the purpose of constructing thereon a Post Office and Federal Court building to cost approximately $430,000, and shall receive in exchange and trade therefor the property known as the present Post Office and Federal Court site in said City, the building thereon to be used for City purposes and as a Common Pleas Courthouse. Such exchange and trade shall be done in accordance with Commission Form Ordinance No. 905, passed and approved on the 11th day of February, 1941, which ordinance specifically describes the parcels of land to be exchanged and to which reference is made for a more specific description.

The polling places for said election will be as follows:

Ward 1 — Courthouse
Ward 2 — Police Station
Ward 3 — Trinity Lutheran Hall
Ward 4 — Fairground Park
Ward 5 — J. C. Cole Store
Ward 6 — Salvation Army Hall
Ward 7 — Evangelical Church
Ward 8 — Maple Avenue Church
Ward 9 — Meyer's Store
Ward 10 — Pentecostal Church.

The polls at said election will be open on the date mentioned above at each of said polling places from 6:00 A. M. to 7:00 P. M.

Done by order of the City Council of the City of Cape Girardeau, Missouri, this 11th day of February, 1941.

W. C. KAEMPFER,
City Clerk.

[fol. 637] Said notice shall also be inserted in one (1) issue of the aforesaid weekly newspaper.

Section 6: Only duly qualified voters registered as such in said City shall be entitled to vote at said election.

Section 7: The City Clerk shall provide the judges of election at each polling place the necessary election supplies for the conduct of said election, including the registration books for each ward. The ballots for said election shall be in substantially the following form:

Special Election Ballot

Proposition

The City of Cape Girardeau shall, through the proper officials, offer to convey, and convey if said offer be accepted, a portion of what is commonly known as Courthouse Park owned by said City, to the United States of America for the purpose of constructing thereon a Post Office and Federal Court building to cost approximately $430,000, and shall receive in exchange and trade therefor the property known as the present Post Office and Federal Court site in said City, the building thereon to be used for City purposes and as a Common Pleas Courthouse. Such exchange and trade shall be done in accordance with Commission Form Ordinance No. 905, passed and approved on the 11th day of February, 1941, which ordinance specifically describes the parcels of land to be exchanged and to which reference is made for a more specific description.

Yes

No

(To vote for the trade, strike out No; to vote against the trade, strike out Yes.)

Section 8: The judges of election in each ward shall count all ballots and certify to the City Clerk the result of said election, and shall return to said Clerk the poll books, the tally sheets, the registration books, and all ballots, whether used or not used, in accordance with the general election laws of the State of Missouri and the Ordinances of this City.

Section 9: If the majority of all the votes cast in said City are "Yes", then Commission Form Ordinance No. 905 shall be in full force and effect, and the City Council shall proceed in accordance therewith. If the majority of all the votes cast are "No", then the City Council shall repeal Commission Form Ordinance No. 905.

[fol. 638] Section 10: All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

Section 11: This Ordinance shall be in force and effect ten (10) days after its passage and approval.

Passed and Approved This 11th day of February, 1941.

HINKLE STATLER,
Mayor.

Attest:
W. C. Kaempfer,
City Clerk.

I, W. C. Kaempfer, City Clerk of the City of Cape Girardeau, Missouri, hereby certify the above and foregoing to be a true and correct copy of Commission Form Ordinance No. 906, passed and approved on the 11th day of February, 1941.

In witness whereof, I hereunto set my hand and affix the seal of the City of Cape Girardeau, Missouri, this 5th day of March, 1941.

(Seal)

W. C. KAEMPFER,
City Clerk.

Cape Girardeau, Mo.

P. O.; Ct. H. Etc. (New)

[fol. 639] Official Vote Of Special Election
March 4th, 1941

I, W. C. Kaempfer, City Clerk of the City of Cape Girardeau, Missouri, hereby certify that this is a true and correct statement of the vote polled at the Special Election held in the City of Cape Girardeau, Missouri, Tuesday, March 4th, 1941.

Proposition.

The City of Cape Girardeau shall through the proper officials, offer to convey, and convey if said offer be accepted, a portion of what is commonly known as Courthouse Park owned by said City, to the United States of America for the purpose of constructing thereon a Post Office and Federal Court building to cost approximately $430,000.00, and shall receive in exchange and trade therefor the property known as the present Post Office and Federal Court site in said City, the building thereon to be used for City pruposes and as a Common Pleas Courthouse. Such exchange and trade shall be done in accordance with Commission Form Ordinance No. 905, passed and approved on the 11th day of February, 1941, which ordinance specifically describes the parcels of land to be exchanged and to which reference is made for a more specific description.

	Ward No. 1	Ward No. 2	Ward No. 3	Ward No. 4	Ward No. 5	Ward No. 6	Ward No. 7	Ward No. 8	Ward No. 9	Ward No. 10	Total
For the Trade—Yes	129	161	222	229	99	117	182	144	227	102	1612
For the Trade—No	127	173	181	158	75	107	217	93	173	40	1344
	256	334	403	387	174	224	399	237	400	142	2956

In witness whereof I have hereunto set my hand as the City Clerk and affixed the seal of the City of Cape Girardeau, Missouri, this 5th day of March, 1941.

(Seal)

W. C. KAEMPFER.
City Clerk.

[fol. 640] Mr. Bowman: Then minutes of the proceedings of the City of Cape Girardeau in Journal Book R, on page 41, the minutes are in words and figures as follows:

"Special Session

November 26, 1940.

"Council convened in special session at the call of the Mayor, with Mayor Statler presiding and all members present. There was then given its first, second and third readings, Resolution authorizing the Mayor of the City of Cape Girardeau, Missouri, to execute offer to exchange property with United States of America. On motion of Mayor Statler, seconded by Mr. Steck, the resolution as presented was ordered to remain on file one week for public inspection before final adoption. Ayes and Nays."

The Court: Was it adopted or not?

Mr. Blanton: Yes, sir, unanimously, Your Honor, according to the record here.

Mr. Bowman: Now I want to call the witness' attention, I will ask the witness:

Q. Now Mr. Kaempfer, this referendum that I have just read to you—

Mr. Blanton: You mean resolution.

Mr. Bowman: No, sir; I mean this minute concerning this. Who prepared this?

The Witness: The minutes?

Q. Yes, sir.

[fol. 641] A. I did.

Q. Why is that part of it erased and some of the rest of it added in here?

Mr. Blanton: Object as impeaching his own record, he is offering to impeach his own witness.

The Court: Overruled.

Q. When were these other injections that are typewritten [that are typewritten] here, when were they put in there, in the minutes?

A. They were put in there before these minutes were approved.

Q. When was it?

A. This minute here was approved on December 2nd.

Q. Now the further minutes on page 42 of this Book R, will you show where that reference is to that—No, sir, on December 4th, here it is: "Special Session. December 4th. Council convened in special session at the call of the Mayor, with Mayor Statler presiding. All members present. Now at this time there is again presented resolution heretofore presented to the Council on November 26, 1940, authorizing the Mayor to submit a proposition to the United States—

Mr. Blanton: Proposal.

Mr. Bowman: I mean "proposal" to the United States of America for exchange of property for the Court House site, and the resolution again being presented and called [fol. 642] up for passage, a vote was called for and all members of the Council voted for adoption of the resolution. The motion was made by Mayor Statler and seconded by Mr. Steck."

Mr. Bowman: I desire also to introduce in evidence the minutes concerning the matter on page 43 of these minutes.

"The following resolution was then presented:

Resolution:

"Whereas, on the 26th day of November, 1940, the City Council passed on the 4th—or this is December 7th—on the 4th day of December, 1940, formally adopting a resolution authorizing the Mayor to execute an offer to the United States Government to exchange property; and

"Whereas, pursuant to said resolution the Mayor did execute such offer; and

"Whereas, the Mayor on the 6th day of December, 1940, sent the following telegram by Western Union to Walter A. Meyer, Fourth Assistant Postmaster-General of the United States:

"Cape Girardeau, Missouri,
December 6, 1940.

Walter A. Meyer,
Fourth Assistant Postmaster-General,
Post Office Building,
Washington, D. C.

"Understand Committee has suspended action on Cape Girardeau post office. Please wire me action taken and cause therefor."

Signed,

HINKLE STATLER,
Mayor."

[fol. 643] "And Whereas, the Mayor received the following telegram by Western Union from said Walter Mayer:

"December 7, 1940
Washington, D. C.

"Hon. Hinkle Statler, Mayor,
Cape Girardeau, Missouri.

This is the telegram from Walter Meyer:

"Answering yours of December 6th. Federal Works Agency advises that further action on all building projects where construction bids had not yet been asked is being deferred at the direction of the Bureau of Budget. On the timely proposal of yourself as Mayor and representatives of Cape Girardeau the Committee was ready to take action quite sometime ago but same was deferred for the purpose of hearing Lowery and Kelso, representing petitioners, object to the City's proposal. This delay deferred action beyond the time when the order of the Budget Bureau became effective without notice. Consequently no action can be taken on your proposal because bids cannot now be invited.

WALTER MEYER,
Fourth Assistant Postmaster-General."

"And Whereas, it has now become apparent that the United States Government has now deferred any action on said proposal, Therefore,

"Be It Resolved that the resolution passed on the 26th day of November and approved on the 4th day of December, 1940, be and is hereby in all things rescinded."

[fol. 644] "On motion of Mr. Beckman, seconded by Mr. Batchelor, the resolution as presented was adopted by the following vote:

Ayes: Batchelor, Beckman, Statler and Steck.

Nays: None.

"There being no further business, on motion of Mayor Statler, seconded, the Council adjourned."

Mr. Bowman: Now the minutes of February 11th on page 48 of the Minute Journal No. R of the City.

The Court: What year?

Mr. Bowman: 1941.

"On motion of Mr. Beckman, seconded by Mr. Batchelor, roll was called for its final passage. There was then given"—This is what I want to introduce: "There was then given its first, second and third readings an ordinance authorizing and directing the Mayor of the City of Cape Girardeau, Missouri, to execute an offer to the United States of America to exchange certain property owned by the City of Cape Girardeau for property owned by the United States of America in the City of Cape Girardeau and authorizing the Mayor to execute such instruments as may be necessary to consummate the exchange of said property should said offer be accepted.

"On motion of Mayor Statler, seconded by Mr. Steck, roll was called for its final passage, the vote resulting as follows:

[fol. 645] Ayes: Batchelor, Beckman, Statler, Steck.

Nays: None.

"Whereupon, the Mayor declared said ordinance duly adopted and in the presence of the Council signed its approval thereto. Said ordinance is Commission form No. 905. There was then given its first, second and third readings an ordinance calling a special election for the purpose of testing the sense of the qualified voters of the City of Cape Girardeau, Missouri, and on ordinance known as Commission form ordinance No. 905 whereby it is pro-

posed that the City of Cape Girardeau offer to convey to the United States of America certain property on which the United States shall build a post office and Federal Court building in exchange for a deed from the United States of America to the City of Cape Girardeau, the property now owned by the United States in said City, known as the present Post Office property, and designating the time of said special election and the places at which it shall be held, appointing judges of said election, prescribing the manner of holding said election, the form of the ballot and the form of the notice of said election, and directing its publication.

"On motion of Mr. Statler, seconded by Mr. Steck, roll was called for its final passage. The vote resulted as follows:

[fol. 646] Ayes: Batchelor, Beckman, Statler, Steck.

Nays: None.

"Whereupon, the Mayor declared said ordinance duly adopted and in the presence of the Council signed his approval thereto. Said ordinance is Commission Form Ordinance No. 906."

Mr. Blanton: Which constitutes a portion of "Defendant's Exhibit J".

Mr. Bowman: Now if it is necessary—has this been introduced, for instance, the reference with reference to the election?

Mr. Blanton: It constitutes a portion of Exhibit J, Judge. It is the last sheet of Exhibit J showing the result of that special election which you have already offered in evidence.

Mr. Bowman: And showing that it was on the 4th of March, 1941?

Mr. Blanton: Yes, sir; it is certified. It is certified as the 5th day of March, 1941, showing for the trade 1612 against trade 1344.

Mr. Bowman: Now in connection with this Ordinance 905, I especially call the Court's attention to this reference

back to that first ordinance or resolution that I introduced, on November 26, 1940, that in this section No. 905, it says, "Whereas, on the 4th day of December, 1940, a resolu-[fol. 647] tion was passed and adopted by the City of Cape Girardeau." Now this is different from the ordinance. Have you that ordinance here? Will you bring that ordinance?

The Witness: No. 905?

Mr. Bowman: Yes, sir, Numbers 905 and 906.

(Witness procures a book and returns to the witness stand).

By Mr. Bowman:

Q. Well now, when were those dates put in here on this ordinance No. 905?

A. When it was passed.

Q. And those changes that were made on the minutes when part of it was marked out and the rest of it added in, was that on December 4th, when it was finally passed?

A. No, sir; when the minutes were approved on the first regular meeting in December. I forget the date.

Mr. Blanton: That was December 2nd according to the minutes that Judge Bowman has offered.

Mr. Bowman: Well, the copies of this that I read refer back to November—I mean back to that date of November 26th, but this reference in this shows December 4, 1940. Those were introduced in evidence. They are already here, I didn't need to introduce them.

Mr. Blanton: As a matter of fact, that exhibit is a certified photostatic copy of the original.

The Court: Very well, what is the next?

[fol. 648] By Mr. Bowman:

Q. Now then, do you remember Mr. Kaempfer, that when you were clerk there that there was a referendum petition filed? A. Yes, sir.

Q. By the people in the City of Cape Girardeau?

A. That is right.

Q. Do you remember the date it was filed with you?

A. No, I don't remember the date. I think it is probably on one of the petitions.

Q. Have you got the referendum petitions here now? A. Yes, sir. (Witness procures papers and returns to witness stand) I think it was filed on the 5th, about the 5th day of December, 1940.

Q. Now you say this was filed on the 5th or 6th of December, is that right? A. Yes, sir.

Mr. Cooper: 1940?

The Witness: Yes, sir.

Mr. Bowman: I wish to call—May I ask this question, Your Honor? For instance, if you want to refer to a certain statute, section of the statute, do we have to introduce that as evidence?

The Court: You do not have to introduce the Statute, you are supposed to take notice of the Statutes of Missouri.

Mr. Bowman: They can be referred to in argument or [fol. 649] afterwards?

The Court: Without introducing in evidence.

Mr. Bowman: Now then, I want to introduce this Referendum petition that was filed with the City Clerk of the City of Cape Girardeau on the 5th day of—5th or 6th day of December, 1940.

Q. (Mr. Bowman) How many people signed that, do you know?

A. (The Witness) I don't remember.

Mr. Bowman: Of course, we could count them here; but I know, I would be glad if there is no objection.

Mr. Blanton: We are going to object to the whole thing.

Mr. Bowman: You are going to get it to the number of people who signed it.

Mr. Blanton: There is no evidence to show who signed it, or whether they are qualified or anything else.

Mr. Cooper: For that matter, there is no evidence yet that anybody signed it.

Mr. Bowman: It shows of itself.

Mr. Bowman: Can you read whether there were 2100 and some odd signatures on the petition?

Mr. Blanton: I don't know. I have never seen it.

Mr. Bowman: It is in the statement here.

The Court: Could you take Counsel's statement for it [fol. 650] subject to correction later?

Mr. Blanton: Yes, sir.

The Court: Proceed with your offer. You are offering this petition. It is agreed that the petitions contained 2100 and some odd names, subject to corrections later if it is found there was error, to save offering the petitions in evidence. They will just encumber the record. However, determine if the record shows what the petitions are.

Mr. Bowman: Let me read that so that we can get that in the record.

The Court: The Court doesn't know what they are about.

Mr. Blanton: Neither do I, Your Honor.

Mr. Bowman: Referendum Petition.

"We the undersigned citizens, residents and duly qualified electors of the City of Cape Girardeau, in accordance with Sections 6924, 6925 and 6926 of the Revised Statutes of Missouri, 1929, are protesting to the Honorable Mayor and City Council against the passage of the following ordinance or resolution, called a resolution but having the effect of an ordinance, adopted by the City Council on the 26th day of November, 1940, to-wit: Resolution authorizing and directing the Mayor of the City of Cape Girardeau to execute an offer to exchange property with the United States of America.

"Whereas, on July 15, 1940 the Council of the City of [fol. 651] Cape Girardeau authorized and directed the Mayor and City Clerk to execute an offer to exchange property with the United States of America, and,

"Whereas, on said date further study has been made and was made—

Mr. Blanton: "Whereas, since said date."

Mr. Bowman: "Whereas, since said date further study has been made and negotiations have been conducted between the City and representatives of the United States; and

"Whereas, the Council is now fully informed and deems it to be to the interest of the City and in furtherance of the general welfare thereof to convey a parcel of the property, now owned by the City, to the United States of America for the purpose of constructing thereon a post office and Federal Court Building and to accept in exchange therefor a parcel of land and building thereon now owned by the United States of America and used as the present post office and Federal Court Building;

"Now, Therefore, Be It Resolved that the Mayor and City Clerk of the City of Cape Girardeau be authorized and directed to execute for and in behalf of the City of Cape Girardeau an offer to convey to the United States the following described parcels of land, to-wit: A tract of ground in the City of Cape Girardeau, Missouri, described as follows: (I will not read the description which has been [fol. 652] read to you several times) A tract of ground described as follows, "for the purpose of constructing thereon a post office and Federal Court building and to accept in exchange therefor and in consideration for the conveyance by the City the following described parcel of land and buildings thereon now owned by the United States of America," (Then the description is set out) "for the use and purposes of the City of Cape Girardeau, Missouri.

"Be It Further Resolved, that the Mayor and City Clerk be directed to make and file an application with the United States of America to continue the use of the building now being used for library purposes upon payment of a monthly rental therefor of one dollar per month for such period of time as may be consistent with the policy and requirements of the United States.

"Be It Further Resolved, that in the event said above authorized offer is accepted by the United States of America that the Mayor and City Clerk be authorized and directed to take such steps as may be necessary to con-

summate exchange of the said properties for the purposes aforesaid.

"Dated and adopted this 26th day of November, 1940.

(Signed by) HINKLER STATLER.

Attest: W. C. Kaempfer,
City Clerk."

"The undersigned also petition and request that the City Council of Cape Girardeau reconsider said ordinance or resolution, and if upon reconsideration the same is not [fol. 653] entirely repealed the City Council shall submit said ordinance as is provided by subsection (b) of Section 6925 of the Revised Statutes of Missouri, 1929, to a vote of the people of the City of Cape Girardeau."

Mr. Bowman: That is the offer.

Mr. Blanton: We want to offer an additional objection that the record which Judge Bowman has just offered in evidence previously when reading from the minutes of the Clerk show that the very resolution which he wants to submit to referendum by this petition was repealed in accordance with this request at the meeting of the City Council, and therefore there was not any ordinance on the books when the resolution of which this was a referendum for, it was not even on the books.

Mr. Bowman: What we want to show by the testimony is that this ordinance is not in existence; it was rejected.

The Court: As I understand, the statement of the defendant is that the City of Cape Girardeau has no legal authority of any nature, character or description to convey or enter into a contract to convey this court house property that the Library is located on?

Mr. Kelso: That is not entirely true. The purpose of this offering, as I understand it Your Honor, is that the plaintiff is offering its case on the theory there was a contract bottomed upon a city ordinance, and this testi- [fol. 654] mony is offered for the purpose of showing that there was no ordinance at that time existing authorizing the contract, because it had been repealed and there was not anything in the contract that referred to this

contract which has been repealed and which Counsel says had no effect.

The Court: A referendum petition signed by over 2,000 names says whether an ordinance is in effect or not.

Mr. Kelso: The resolution shows that that ordinance was repealed, and Counsel for the Government said, the plaintiff in this case, that this has no effect because that ordinance or resolution was already repealed and rescinded and is now off the books and was then off the books, and there was nothing about which there was to be an election, so they agreed.

Mr. Blanton: No, sir, I did not say that. I said the resolution, which these referendum petitions here attacked, had been repealed at the time this had been filed, but there was later adopted and is still in effect the ordinance and resolutions, Ordinance 905 and 906 which you have previously introduced in evidence.

The Court: I will overrule the objection at this time.

Mr. Blanton: Note our exception.

Mr. Bowman: Now so that you may know about this part of this, this is at the bottom. These parties each had [fol. 655] to make an affidavit when they got this signed. I want it so you will understand, they had all to swear to it, so I will read one of these because everyone is the same.

The Court: Proceed.

Mr. Bowman: "State of Missouri, County of Cape Girardeau.

"I Henry J. Berman, one of the signers of above petition and a legal voter of the City of Cape Girardeau, Missouri, upon my oath state that the statements made in said petition are true to the best of my knowledge and belief, and further state that each signature affixed to said petition is the genuine signature of the person whose name it purports to be, and that all of the signers were at the time of signing said petition legal voters of the City of Cape Girardeau, Missouri.

"I also state under oath that at the time of making this affidavit there were thirty-one signers to the above petition."

Now that is just one.

Mr. Blanton: Read all of the oath.

Mr. Bowman: The date of the oath. "Subscribed and sworn to before me on this 5th day of December, 1940.

(Signed) WILLIAM H. VEDDER,
a Notary Public" (with the seal attached).

Mr. Bowman: Each one of these are filed on—I will read another part of this petition:

[fol. 656] "William C. Kaempfer,
City Clerk.

Dear Sir:

"On December 5, 1940, I signed a petition with reference to the City Council to repeal an ordinance which it passed offering the United States Government a site for a proposed new post office building in what is commonly known as Court House Park. I would like to have my name removed from the petition, if it is possible."

The party did that on December 6th, the next day. I don't know how many did that, but that would make us 2105 if that was—

The Court: Let's get on some other subject. I think we have exhausted that.

Mr. Bowman: Now then, what was the total amount of the election that was had when the citizens in the City of Cape Girardeau were all included? It was agreed on before as to what it was.

Mr. Cooper: The total number of votes cast is shown by the exhibit that he has already offered, 1600 and some odd.

Mr. Bowman: No, sir; that is an election that came after this. There has to be one-fourth of the total electors before the referendum petition is valid.

The Witness: I can tell by referring back to the record in the journal.

[fol. 657] The Court: I understand he is referring to what the total vote was?

The Witness: For Mayor at the last preceding election.

Mr. Bowman: Yes, sir. We have to show there was at least one-fourth or more.

The Witness: 5,755 votes were cast at the election held April 2, 1940. That was the general Municipal election.

Mr. Bowman: Yes, sir. Mark this Defendant's Exhibit.

Mr. Cooper: Maybe we can make an agreement and save filing that.

The Court: They read the page of the petition, and it was agreed by Counsel it was signed by 2200 people, subject to correction.

Mr. Bowman: I want the advantage in using this.

The Court: I think you have the advantage. You have the body of the petition dictated into the record as to how many people signed it. Is there some other purpose you want to use it for?

Mr. Bowman: I think I have all the information in that.

The Court: If you insist you can offer it in the record. I was making that suggestion because it is going to cost somebody a lot of money to print the record with all these petitions.

Mr. Bowman: We have that 2106. Was the contract with the United States and Cape Girardeau — City of Cape [fol. 658] Girardeau I mean, was that contract prepared and signed?

Mr. Blanton: Your Honor, if there is a contract we do not know what it refers to. Maybe it ought to be identified.

The Court: Overruled.

Mr. Bowman: It is the one you have been talking about, have you got that contract on file with the clerk?

The Witness: I have not, no, sir.

Mr. Bowman: Would it be possible to get that contract from you at your office as City Clerk if some subpoena is made?

The Witness: I do not have that.

Mr. Bowman: You do not have that?

The Witness: No, sir.

The Court: Has that contract been offered in evidence?

Mr. Blanton: If I knew what contract he refers to, I think I could answer Your Honor's question.

The Court: There is some stipulation, Exhibit 2, called the Site Proposal.

Mr. Cooper: The Site Proposal and Acceptance of it, I think has been offered.

Mr. Blanton: And I might further state we will concede that subsequently there was executed by the City a bond in the form called for in that site proposal.

Mr. Kelso: May I inquire, if it has never been offered in the record, it seems that would require the plaintiff to [fol. 659] offer that in the record.

Mr. Blanton: We have no objection.

Mr. Kelso: The record does not show what the bond was for, that you are talking about.

Mr. Blanton: It was in compliance with the conditions of the site proposal, and was approved.

Mr. Cooper: Construction matters, and has nothing to do with the acquisition of the site.

Mr. Kelso: Did the bond have anything to do?

By Mr. Bowman:

Q. Mr. Kaempfer, will you turn to the minutes of Journal Book R and read the minutes concerning the issuing of a bond that was ordered, back in November of 1941?

A. November, 1941?

Q. I think that is the date of it, or something.

A. "On November 3rd at a regular session the following resolution was presented: A resolution authorizing the Mayor to execute a bond in the penal sum of Five Thousand Dollars to the United States of America." Now the body of the resolution is not embodied in the minutes; but that I think had reference to razing the present structure.

Q. Present structure of what?

A. Common Pleas Court Building.

Mr. Blanton: What was the date of that, Mr. Kaempfer, please?

A. November 3, 1941.

[fol. 660] By Mr. Bowman:

Q. What was the number of the ordinance or resolution?

A. Resolutions are not numbered; ordinances are.

Q. Was that an ordinance?

A. It was a resolution.

Q. Have you that?

A. I have it over at the office but not here.

Mr. Bowman: I would like to introduce that, and we will make a copy of it and give it to you.

The Court: Any objection of Counsel for using a copy of the resolution which is referred to?

Mr. Blanton: No, sir.

Mr. Cooper: No objection to using a copy. We object to it being offered in evidence because it is wholly immaterial to this case. It encumbers the record.

The Court: Very well, objection overruled.

[fol. 661] Resolution Authorizing And Directing The Mayor Of The City Of Cape Girardeau, Missouri To Execute Offer To Exchange Property With United States Of America

Whereas, on July 15, 1940 the Council of the City of Cape Girardeau, Missouri authorized and directed the Mayor and City Clerk to execute an offer to exchange property with the United States of America, and

Whereas, since said date further study has been made and negotiations have been conducted between the City and representatives of the United States, and

Whereas, the Council is now fully informed and deems it to be to the interest of the City and in furtherance of the general welfare thereof, to convey a parcel of the property now owned by the City to the United States of America for the purpose of constructing thereon a Post Office and Federal Court Building, and to accept in exchange therefor the parcel of land and building thereon now owned by the United States of America and used as the present Post Office and Federal Court Building;

Now, Therefore, Be It Resolved That the Mayor and City Clerk be authorized and directed to execute for and in behalf of the City of Cape Girardeau an offer to convey to the United States of America the following described parcel of land, to-wit:

A tract of ground in the City and County of Cape Girardeau, Missouri, described as follows:

Begin at a point on the east line of Lorimier Street, said point being 100.0 feet north of the intersection of the east line of Lorimier Street and the center line of Themis Street extended; thence South 82° 59′ E., and parallel to the center line of Themis Street extended, 240.0 feet; thence South 6° 58′ W., and parallel to the east line of Lorimier Street 280.0 feet; thence North 82° 59′ W., and parallel to the center line of Themis Street extended, 240.0 feet to the east line of Lorimier Street; thence North 6° 58′ E., along the east line of Lorimier Street 280.0 feet to the point of beginning.

[fol. 662] for the purpose of constructing thereon a Post Office and Federal Court Building, and to accept in exchange therefor and in consideration for the conveyance by the City the following described parcel of land and building thereon now owned by the United States of America, to-wit:

Begin at the southeast corner of the intersection of Broadway and Fountain Streets in the City of Cape

Girardeau, and measure along the south side of Broadway Street 125 feet and five inches; thence south, parallel with east line of Fountain Street 165.175 feet to an alley; thence west along the north side of said alley 125 feet and five inches to the east line of Fountain Street; thence north along the east line of Fountain Street 165.175 feet to place of beginning, all located in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri,

for the uses and purposes of the City of Cape Girardeau, Missouri.

Be It Further Resolved, that the Mayor and City Clerk be directed to make and file an application with the United States of America to continue the use of the building now being used for library purposes upon payment of a monthly rental therefor of One Dollar ($1.00) per month for such period of time as may be consistent with the policy and requirements of the United States.

Be It Further Resolved, that in the event said above authorized offer is accepted by the United States of America, that the Mayor and City Clerk be authorized and are hereby authorized and directed to take such steps as may be necessary to consummate the exchange of said property for the purposes aforesaid.

Dated and adopted this 26th day of November, 1940.

HINKLE STATLER

Attest
W C Kaempfer
City Clerk

[fol. 663] By Mr. Bowman:

Q. Now Mr. Kaempfer, do you know whether or not that contract was made with the United States concerning the exchange of the post office and the Court building, Common Pleas Court, in the park?

A. I assume that it was; yes, sir.

Q. Do you know whether it was?

Mr. Cooper: The site proposal and acceptance speak for themselves, Your Honor. They are asking for a conclusion of the witness.

Mr. Bowman: I am trying to get hold of the contract I want to file. There has been a lot offered in evidence. Is that what you refer to? Contract on exchange of property which is the one they repealed, and passed another?

The Court: Proceed.

By Mr. Bowman:

Q. Do you know whether there was a contract actually accepted and signed by the United States Department and the city officials of Cape Girardeau, Missouri?

A. I don't know whether it was signed by the United States. There was a proposal submitted to exchange that property for this property, yes, sir.

Q. There was a proposal made to exchange it?

A. Yes, sir.

Q. Was it accepted by the United States?

A. I don't know that.

Mr. Kelso: May I ask the witness one question?

[fol. 664] The Court: Yes, sir; you may.

By Mr. Kelso:

Q. Mr. Kaempfer, has there ever been anything in your office since this proceeding to exchange property, or this ordinance, to exchange property down to this time, relating to the matter? A. Of what?

Q. Any of the papers relating to this condemnation suit or the exchange of the property, to be found in your office?

A. No, sir; I think they are all in the hands of the City Attorney, in his files.

Q. And as attorney for the defendant Carmack in this case, I have repeatedly urged you to get the files in your office so they would be available in the preparation for the defenders of this case?

A. Yes, sir, you have been down there and asked for the files, but I didn't have the files.

Q. And I phoned you to try to get them back in your custody and they never have been there, have they?

A. That is right, they have not.

Mr. Bowman: The election and certificates, and everything in connection with the election, has that been introduced? I want to introduce that, on March 4th or 5th, when the election was, and I want evidence concerning that election.

The Court: I thought that was in the exhibit that you [fol. 665] offered, Exhibit J?

Mr. Bowman: That is already in there? I just wanted to be sure it was.

The Court: Is the witness excused?

Mr. Bowman: Yes, sir.

Mr. Bowman: They are asking me to be a witness.

The Court: No law against it that I know of.

L. L. Bowman of lawful age, produced, sworn and examined, testified on behalf of defendants as follows:

Direct Examination.

By Mr. Hall:

Q. State your name, please. A. L. L. Bowman.

Q. Where do you reside?

A. I reside in Cape Girardeau at 624 North Street.

Q. In the City of Cape Girardeau, Missouri?

A. Yes, sir.

Q. You are one of the attorneys for the defendant Iska W. Carmack in this present suit, are you?

A. Yes, sir.

Q. And you have been in that capacity since the defendant Carmack intervened in this case? Is that correct?

A. I do not understand that.

[fol. 666] (Last preceding question was read)

A. Yes, sir.

Q. How long have you lived in the City of Cape Girardeau, Missouri?

A. Oh, since about 1894.

Q. What is your profession? A. Lawyer.

Q. Did you ever occupy any official position in Cape Girardeau County?

A. Yes. sir.

Q. What was that position?

A. Well, I was Judge of the Cape Girardeau Court of Common Pleas for eight years, and I was president of the Board of Education for about ten years.

Q. The Cape Girardeau Court of Common Pleas, that you mentioned, is a court of record established by the laws of the State of Missouri, is it? A. Yes, sir.

Q. When were you the Judge of that court?

A. From 1933 to 1940, inclusive.

Q. Where was the site that was the site of that Court of Common Pleas during the time that you were Judge, up until the present time?

A. In the building on the Court House Park that is sought to be condemned.

[fol. 667] Q. The property that is described in the condemnation petition in this suit?

A. Yes, sir, is located on that property.

Q. During the time you have represented the defendant Mrs. Carmack, have you had any interviews with any representatives of the United States here in Cape Girardeau or elsewhere?

A. In Cape Girardeau, yes, sir.

Q. With whom have you had interviews or conferences with reference to this matter? I mean conferences with persons representing the United States?

A. One by the name of Tucker, who represented that he represented the Government and asked for a meeting of the citizens of Cape Girardeau.

Q. Was that Mr. Tucker, the architect who was referred to yesterday by witness Walter Meyer, Fourth Assistant Postmaster-General?

A. Yes, sir; that is the one.

Q. How many times did you meet Mr. Tucker, the architect, here in connection with this matter, this controversy?

A. I talked to him two different times; one at the date of the meeting and another time when he invited us to call a meeting so that we could all meet.

Q. Do you recall about when that was, the date of it?

A. No, sir, I don't know the date. It was back in — I be-

[fol. 668] lieve it was back in 1940.

Q. Did you have any conversation with him, the architect Tucker, with respect to the proposal that he was here to consider with reference to the selection of a site for a new post office building in Cape Girardeau?

A. In the meeting with the —

Mr. Blanton: Your Honor, if he is going to relate some conversation with Mr. Tucker, we want to object to it as not being binding on the United States, the conversation Mr. Tucker might have had with the witness. If he wants to

refer to some report which the architect made to the Committee to select these sites, and it was considered by that Committee, we have no objection to his offering such a report; but the conversation with anybody that came out here from Washington or any place else and talked to this witness, would not be binding on the Government or create an estoppel against the Government.

Mr. Hall: May I say that the Government's witness Meyer yesterday testified that his joint committee or the Administrator of the Federal Works Agency had sent Mr. Tucker out here as the representative of the Government in connection with this very matter and to view the proposed site for the post office, and that Mr. Tucker, the architect, had not made any written report. Now certainly a statement made by a representative of the Government here, which of course speaks only through its individual [fol. 669] employees and representatives, is competent it seems to us.

Mr. Blanton: Your Honor, Mr. Meyer as I recall his testimony, didn't state.

The Court: Objection overruled at this time.

Mr. Blanton: Note our exception.

Q. You stated you did have a conversation with him?

A. Yes, sir; I did have a conversation.

Q. What did he say in that conversation with reference to the selection of the Court House Park site as the location for the new post office?

Mr. Blanton: Without encumbering the record, may our objections run to all these questions about conversation?

The Court: Yes, sir.

A. The first part of the statement that he made was when he was talking about the crowd, he stated that he was a contractor and had been sent down here.

Q. Contractor or architect?

A. Architect I mean. He had been sent down here for the purpose of taking up the estimating expenses of various things that had to be done, like the rebuilding and different things, and so stated that that was what he was, what he was here for and that is what he was doing, and said that

he wouldn't make any other reports to us. And I talked to him then, after it was over with; in having a conversation with him I asked him to go with me to some of the other [fol. 670] parties that were interested. I tried to get him to go down and look at some of the various different things that might be considered, as an architect. And he said, no he was not authorized to examine anything except this building and the court house building, and wouldn't go. And then since he hadn't stated any expense in connection with this building, I asked him what would the City have to spend on this building, and he said that his estimate was that in order to rearrange the inside of this building —

Mr. Blanton: Your Honor, certainly that kind of testimony would not touch side, edge or bottom.

The Court: Sustained. What the City may be wanting to do with this building I don't think the Government would control in any manner, shape or form.

Mr. Hall: What I want to have the witness testify to, if Your Honor will allow the question, is as to what this representative of the Government, sent here by the Government as an architect, estimated would be the cost to the city to adapt this present post office building —

The Court: I know, I am sustaining an objection as to what the City might spend on the building. He was not representing the City in any capacity, as has been shown in this record. Proceed with the next question.

Q. Did you have any conversation with any other representative of the Government with respect to the location of [fol. 671] the new post office building on the Court House Park site, except the two conversations, the one at the meeting and the personal conversation that you had with the Architect Tucker.

A. I had nothing further with Tucker except his statement of the possible expense.

Q. You referred to a remark made by the Architect Tucker at the time with reference to visiting other places?

A. Yes, sir.

Q. What do you mean by that? Do you refer to other locations of the town suggested and proposed and considered as sites for the location of the new post office building?

A. No, sir; just because that crowd that was there were objecting, were representing themselves they were objecting to the condemnation of the Court House Park. We wanted to get him interested in making estimates on other places that we thought ought to be used instead of that. And that was the reason we asked him if he wouldn't go with us out to look at other possible places and make some estimates on them so we would have those estimates.

Q. You refer to other possible places, you mean other locations for the construction of the proposed new post office building? A. That is right.

[fol. 672] Q. You stated, I believe, that Mr. Tucker refused to go and said he hadn't been sent for anything except to look at the court house site?

The Court: He answered that question.

A. You asked me, there were two, this fellow Tucker, and there was a fellow by the name of Roome or something like that. We went to a meeting and he wouldn't go to look at a place.

Q. You attended a meeting at which Mr. Roome, who was referred to yesterday by the Government witness Mr. Meyer, addressed a meeting? Is that correct?

A. Yes, sir; I attended that meeting, and during that meeting a man by the name of Mr. Nussbaum, Mr. Nussbaum and I when we went there, we were going to invite him—

Q. No, sir; just tell what conversation you had with this Mr. Roome.

A. That is what I was telling you.

Mr. Blanton: We want to object to any conversation this witness might have had with Mr. Roome for the same reason we objected to the testimony of Mr. Tucker.

The Court: Same ruling.

Mr. Blanton: Exception.

A. It was when Mr. Nussbaum and I went that he did the discussing and answering.

The Court: The question is, Judge, what was your [fol. 673] conversation, if any, with this man Roome?

Q. Tell what the conversation was.

A. Our only conversation was that Mr. Nussbaum and I acting jointly together, asked him if he wouldn't let us go out and show him other property in other places that were available, instead of the one there, because people were opposing the condemnation of that, and he said, "No; I am not supposed to look at anything else" and wouldn't do so.

Q. Well, anything else about what?

A. He wouldn't look at anything else except the Court House Park down where it was to be condemned, that was supposed to be traded for, rather.

Q. Do you remember about when that conversation with Mr. Roome was?

A. I don't know the date, no, sir.

Q. Was it before or after the conversation with Architect Tucker?

A. They were pretty close together; they were not very far apart. I don't know which one came first.

Mr. Hall: You may examine.

Cross-Examination.

By Mr. Cooper:

Q. Now Judge, I believe you say that was in 1940 when you had this conversation with Mr. Tucker?

A. As I stated, I estimated it was that, because I never kept the date.

[fol. 674] Q. Now at that time were you representing the defendant and intervener Carmack, or were your representing some other interest?

A. I was not employed to show it, but as Judge of the Cape Girardeau Court of Common Pleas when we heard about the trade I took an interest in it at that time because I didn't want to move into a court house like this to hold court.

Q. Well now, at that time were you representing the defendant Carmack? A. No.

Q. Now when were you first employed by the defendant Carmack, if you were employed by her, to represent her?

A. On the 12th day of January, 1942, the day that the notice showed that answers had to be filed.

Q. 12th day of February, 1942?

A. 12th day of February; that was when the suit was filed back in November, or October or November, I have forgotten the date, but answer had to be filed on the 12th day of January, and she called me up and asked me to file an answer for her.

Q. She called you up? A. Yes, sir.

Q. Over the telephone?

A. Yes, sir.

Q. Now when did she first appear in your office rel-
[fol. 675] ative to your employment?

A. Oh, she appeared several—before that I don't know how long, but it was before the first of January.

Q. She appeared before the first of January?

A. Yes, sir.

Q. Did you and Mrs. Carmack discuss the terms of your employment?

Mr. Hall: Object to that, Your Honor; that wasn't gone into in direct examination.

The Court: Sustained.

Mr. Cooper: I think, Your Honor, that in this case we are entitled to know the terms of the employment, whether on a contingent fee or not because of the fact that if there is an award made in this case the Government is entitled to know what interest if any others have in that award.

The Court: The Court has ruled on the objection.

Mr. Cooper: I am trying to tell the Court my position.

The Court: Well, the Court doesn't agree with you.

Mr. Blanton: Make your offer.

By Mr. Cooper:

Q. Now, Judge Bowman, you said that you were a lawyer a while ago. Are you also in the real estate business? A. Yes, sir.

Q. Do you have a real estate firm or do you operate individually?

A. We have a real estate firm.

[fol. 676] Q. And who comprises that real estate firm?

A. It belongs to myself and my brother, and my other brother that died, his heirs own stock. It is a corporation.

Q. What is the name of it?
A. Bowman Brothers Realty Company.
Q. Bowman Brothers Realty Company?
A. Yes, sir.
Q. Now who is your brother that is still living?
A. W. O. Bowman.
Q. W. O. Bowman? A. Yes, sir.
Q. He is interested in the corporation, and you are interested in the corporation? A. Yes, sir.
Q. Now the Deutsch report shows that certain offers were made by, I think, W. O. Bowman. Were those made, if you know in his individual name, or were they made for the Bowman Realty Company?
A. He was acting for the Bowman Realty Company except he discussed it with me. The Bowman Realty Company.
Q. Now at the time this case was first tried here you recall Judge Kelso getting into the case at that time, do you? A. How is that?
Q. Do you recall Judge Kelso coming into this case at the time it was first tried here before Judge Collet?
A. Yes, sir.
[fol. 677] Q. Do you recall Judge Kelso telling the Court at that time that he was appearing amicus curiae, as a friend of the Court, that he was not representing Mrs. Carmack?
A. Well, he first started, I don't know how he was in, but he was interested in it representing the people, but afterwards I asked him if he wouldn't become an attorney, an associate with me, since he was interested in it for Mrs. Carmack.
Q. Yes, sir; now were you authorized by Mrs. Carmack to employ other counsel in the case?
A. I asked her and she agreed to it. I would not have done it without her consent.
Q. Now that change of employment took place during that trial, did it not?
A. I don't remember. I know I was mighty glad to have Judge Kelso to help us in the trial of the case. He can explain that. I do not know just what the date was, but I know it was especially when we lost the case and had to take an appeal that Mrs. Carmack said that she

would be unable to pay the expenses at that time, and so then we called a meeting of the public people, and we had a meeting and they made an organization all among themselves from that time, said for us to go ahead with the appeal, that they would pay the expense. I don't know how many were present, but there was a whole crowd of them. Mrs. Carmack was there, too. And so they told us, [fol. 678] they said they would sign a bond and also would guarantee the expenses.

Q. Who are some of these people that told you that?

Mr. Hall: If the Court please, we object.

The Court: Sustained. Let's get down to the issues in this case. The Court is going to try this case according to the law, not according to who the attorneys are or what interest the attorneys had in the case. Proceed. It is just wasting time on a matter of this kind, in the Court's opinion.

Mr. Cooper: We now offer to prove by this witness that the attorneys now representing Mrs. Carmack in this case, purportedly representing Mrs. Carmack in this case, are not looking to her for one dollar of the expense of their employment except such amount as she may wish to contribute through this organization mentioned by Judge Bowman. That they are employed by this organization and are looking to that organization for their pay as attorneys and also for the cost that they may incur in connection with the trial of this case.

Mr. Hall: Object to that because it is not responsive to anything brought out on the examination and totally immaterial to the issues in this case.

The Court: Sustained.

Mr. Cooper: That is all.

[fol. 679] Mr. Blanton: This paper Judge Kelso just handed, it seems to me if Your Honor wants to look at it, it is just encumbering the record. It is a stipulation entered into between parties in Washington when Judge Kelso was there taking depositions and admissions set

forth in the document. It stipulates the name of Mrs. Carmack, that she is a direct descendant of Louis Lorimier, she lives outside the city limits but owns some property in town. There is not any point made about that.

The Court: There is nothing before the Court at this time. Are you offering something?

Mr. Kelso: I said Mrs. Carmack had been here and was here this morning for the purpose of proving heirship and for the purpose of proving that she was the owner of town lots and that she paid taxes on them, which had been admitted in the last hearing and which I said briefly I would have Mrs. Carmack here if they wanted to prove heirship.

The Court: Can that be stipulated?

Mr. Blanton: It has already been stipulated and read into the record. (See Court File for above mentioned Stipulation).

The Court: Does that stipulation cover what you are now seeking?

Mr. Kelso: That stipulation does cover it. Last night when Counsel were getting together, were talking about the necessity of proving heirship, we overlooked it.

The Court: All right, what is next?

[fol. 680] Mr. Kelso: The next is certified copy of a resolution adopted by the County Court of Cape Girardeau County at the November Term, 1940. I will ask the reporter to mark it "Defendant's Exhibit K". (The paper is marked as requested).

Mr. Cooper: Let's see that. (A paper is handed to Government Counsel).

Mr. Kelso: This is Exhibit K. We now offer to read it and offer it in evidence.

Mr. Cooper: To which we object because Exhibit K shows on its face it is a resolution dated at the November Term, 1940, purports to be a remonstrance against the use of what we call the Court House Park property by the Government. Since that date the County Court of Cape

Girardeau County have filed two disclaimers whereby they disclaim any interest in that property.

The Court: Has this resolution been rescinded?

Mr. Cooper: No sir.

Mr. Kelso: All that I know is that on yesterday Judge Bowman went out to have the Clerk go over the record, and obtained this certificate on yesterday as the only thing that they could find relative to this matter.

The Court: Overruled.

Mr. Blanton: Note our exception.

[fol. 681] (Defendants' Exhibit K, — 4/19/44 AP.)

November Term, 1940

State of Missouri
County of Cape Girardeau.—ss.

In the County Court of said County on the 25th day of November, 1940, the following, among other proceedings, were had, viz:

In Re. Disposition of Cape Girardeau Court of Common Pleas, for U. S. Post Office site—

Resolution

Whereas, on this the 25th day of November, 1940, it being the fourth day of the November Term of said Court, the following resolution is hereby adopted, to-wit:

Whereas, at all times since the organization of the Cape Girardeau Court of Common Pleas, the courthouse and facilities for the use of said court have, in the major part, been provided by Cape Girardeau County, Missouri, said county having in 1887 and 1888 provided for about nine-tenths of the expense of enlarging and improving the courthouse as it now stands, and all subsequent maintenance expenses including street improvements, and the furnishings and equipment for said courthouse have been in the major part paid by this county up to the present time, with only a minor part of any of said expenses having ever been paid by the city of Cape Girardeau, and this county has, therefore, in the course of time become financially interested to a substantial extent in said court-

house building and the various furnishings, equipment and improvements thereof; and

Whereas, this County Court of said county has become advised of a proposal for said courthouse, thus furnished and improved, to be disposed of by the Mayor and Council of the City of Cape Girardeau without any consultation with this County Court and without any recognition of the interest of this county therein;

Now, Therefore, in consideration of the premises and of the public and the financial interest which this county has in said courthouse building and the furnishings, improvements and equipments thereof, this County Court does protest against any such disposition of the same without recognition of the rights and interests of the county therein and without consultation with this Court as the official representative of said County.

State of Missouri,
County of Cape Girardeau.—ss.

I, Louis H. Schrader, Clerk of the County Court, in and for said County, hereby certify the above and foregoing to be a true copy of the proceedings of our said County Court, on the day and year above written, as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in Jackson, Missouri, this the 18th day of April, 1944.

(Seal) LOUIS H. SCHRADER
Clerk of the County Court of
Cape Girardeau County, Missouri.

[fol. 682] Mr. Kelso: I think the record of the reporter may be confused because of the identification on the record of the document which I used yesterday as the depositions of witnesses. Now the paper or deposition marked "Filed December 13, 1943, by the Clerk of this Court" was handed to me, but in picking up the paper apparently from either my files or somebody else, the copy which is an exact copy, marked "Carmack's Exhibit E", and marked in this case "Defendant's Exhibit C", 4/18/44, should have been made

with the endorsement on the exhibit or deposition filed with the Clerk of this court. And I think it should be stricken off the copy that I offered and put on this correct document.

The Court: Very well, let the reporter mark it.

(The document is marked as requested.)

Mr. Kelso: Now I think it is proper, Your Honor, for me to say that without waiving our rights under the deposition that I have in conformity with what I agreed to yesterday evening tried to eliminate everything possible so far as reading it into the record at this time, and it will be very brief because I find that most of it is exactly in the same situation as the stipulation with reference to heirship and residence. The property is included in the agreed statement of facts. I don't want to eliminate this and not read it, but I do not want to read it into the record at this time.

Now at page 49, lines 4 to 8 of the deposition, I simply [fol. 683] want to read into the record this:

"Mr. Emmert: He acted then as indicated, that day he just happened to be the Acting Administrator that day and signed whatever papers were put on his desk for signature. Mr. Edy, in addition to his other duties acted as Administrator in the absence of the Administrator at that time."

Mr. Cooper: To which we object because that is a statement on behalf of Mr. Emmert, attorney for the Public Works Administration. He was not sworn as a witness, no notice was given to take his deposition, simply a statement made by him in a conversation between him and Judge Kelso there at the taking of the depositions.

The Court: That objection will have to be sustained, Judge.

Mr. Kelso: I want to let the record show that the statement of Counsel is wholly inaccurate as to the facts.

The Court: I do not think a statement of Counsel is binding as evidence in this case one way or another. It will be sustained.

Mr. Kelso: This record will show that Mr. McNerney entered his appearance at the taking of the depositions, participated in the taking of the deposition, and that he was the man who helped to prepare the stipulation which was signed in this case with the agreed statement of facts, and it was arrived at by reason of agreements made by [fol. 684] Counsel representing or appearing for the parties at that time.

The Court: As I understand, this conversation you refer to took place and later you got together and drew up a stipulation? Is that what you have just told the Court?

Mr. Kelso: And we did not include, as I say, these things that I am now calling your attention to, in the agreed statement of facts. And the agreed statement of facts said that "This agreed statement of facts was not intended to limit the right to offer any of this evidence or any other evidence that we might see fit to offer."

The Court: I recall that part of it, but I do not think statements and arguments which take place between counsel at the time of taking a deposition, is evidence unless there is some agreement you entered into that it shall be taken as admissions or stipulations.

Mr. Kelso: I think the record will show that. I am not going to take up the time.

The Court: You say you think the record will show that was agreed that was stipulated?

Mr. Kelso: I think the record will show that we spent all of this time, that they discussed all about being of no consequence with the distinct agreement. And I think this record will show that these parties entered their appearance in this proceeding, namely, for the purpose of taking these depositions; that Mr. Hasson entered his appear- [fol. 685] ance, and Mr. MacLeod entered his appearance, and Mr. Emmert entered his appearance, and these gentlemen, and we undertook to agree as best we could on what witnesses should be called and what were not available, and when witnesses should not be called because they wouldn't have any knowledge or they would state what

their knowledge of the facts were: Now that is a long-drawn-out business and I have agreed to waive that. That statement, my Counsel calls attention to it, is Mr. Emmert had also entered his appearance and was asked to perform the duty of saying what witnesses were informed as to the facts that I would want to know and who were not, and on their oaths that was waived. And Mr. MacLeod called Mr. McNerney's attention that these statements would be in effect the same as Mr. Witman's and others might be, as testimony, because they were making statements, and that they ought to distinguish between when they were testifying and when they were not. And I agreed in this thing that whatever statements that Mr. Emmert made with respect to the list of witnesses furnished I would accept as final and would waive the taking of their depositions. And one of the men that I wanted to know about, of course, was Mr. Fleming, and one was particularly about Mr. Edy, and that is what happened. Now that statement coupled with the other statement —

The Court: Let the Court make its position plain. If you have anything in that deposition that was agreed at the time it was said or at the time of the conversation that [fol. 686] statements that were being made were being taken as stipulations or agreed statement of facts, the Court is not holding that you cannot offer that in evidence, but so far the Court is of the opinion that what you offer is simply conversations that took place between you and Counsel as to getting witnesses there and why witnesses were not available, and that part of the testimony—I mean of the deposition, the Court in its opinion, it is not admissible. The way you are offering it the Court is in the dark as to what part you claim as admission and was stipulation and what part is simply conversation between Counsel.

Mr. Kelso: I think that it ought to be very clear that what we Counsel did was to get together — this record will show that — for the purpose of determining what witnesses that I had listed knew anything about it. And I agreed that I would accept the statement of Mr. Emmert or Mr. McNerney as to whether a witness was without any knowledge of the facts and would omit them, and that if they said actually what the witness knew, I would accept that

statement. And this statement, as the record will show, was made in pursuance of that. Now I think that I will still do what I agreed to, and that is —

The Court: Proceed.

Mr. Kelso: On page 87, lines 12 to 25 I guess, Mr. McNerney —

Mr. Blanton: We want to make the same objection to this as was made to the other.

[fol. 687] The Court: It might be best to let him read it and make a motion to strike it out, and I will know what I am passing on.

Mr. Blanton: Very well.

Mr. Kelso: "Mr. McNerney: I am very doubtful if Mr. John N. Edy had anything to do with this transaction."

"Mr. MacLeod: (He was attorney for the Department of Justice) "He signed it. That is one of those he is asking the testimony of probably for that reason."

"Mr. Kelso: That is all right. Just give the information that you have on it. I will take your word for it." (That is the way we started into it).

"Mr. McNerney: The exception would be that he was the Acting Administrator the day that the papers were executed, and he would have known nothing about it, and the signing of it would have been the only connection that he would have had with it because in the normal conduct of his duties he would not have acted on the matter. He signed the original, that would be the only exception."

Mr. Blanton: Ask that be stricken. It shows a colloquy and conversation between Counsel. Mr. McNerney didn't even appear for the Department of Justice of the United States, which is the plaintiff in this case.

The Court: Is it your position that statement was made pursuant to stipulation that it be offered in this case as an admission? That is what I have asked you a number of times.

[fol. 688] Mr. Kelso: I have tried to say that there is no written stipulation of any kind or character or descrip-

tion, but the deposition shows upon its face the record of what transpired; shows upon its face that in order to decide what witnesses would be called to testify —

The Court: You made that statement a number of times.

Mr. Kelso: That is all I have, and I agreed to take their word.

The Court: Objection sustained.

Mr. Kelso: Now these others, as to Mr. Emmert and others, are the same type, and I will leave it as the record shows without making any further offer.

Mr. Kelso: On page 188 to 189 appears this statement, which I will read.

Mr. Cooper: Let that be read and move to strike, Your Honor?

The Court: Yes, sir; I do not know what it is.

Mr. Kelso: Here is on page 188 first:

"It is agreed by and between the parties" (Mr. McNerney) that the attorney representing the defendant, Iska W. Carmack, in the above entitled proceeding, after conference with Mr. W. E. Reynolds, Commissioner of the Public Buildings Administration and Chairman of the Joint Committee on the selection of the site for the proposed Federal Post Office, Custom House and Court House in Cape Girardeau, Missouri, that the taking of Mr. Reyn-
[fol. 689] old's deposition is waived, upon Mr. Reynold's consent, after advice of Government Counsel, to make available as a part of the record in this proceeding the letter of transmittal and the report of Post Office Inspector M. J. Deutsch, together with all exhibits and enclosures referred to therein, and also the agreement between the City of Cape Girardeau, Missouri, and the United States Government, relating to the exchange of the present Federal office building and site for the proposed new Federal Building site involved in this proceeding."

Mr. Cooper: We do not object to that stipulation. Those things have been offered in evidence.

"Mr. Kelso: It is further agreed by and between the parties hereto that the Postmaster-General, Frank C. Walk-

er, and the Federal Works Administrator, Major-General Philip B. Fleming signed the site selection upon the recommendation of the Joint Committee considering the selection of the site for the Post Office, Custom House, and Federal Court Building, at Cape Girardeau, Missouri, and involved in this proceeding.

"After conference between the attorneys regarding the taking of the depositions of Frank C. Walker, Postmaster-General, and Major-General Philip B. Fleming, Federal Works Administrator, the attorney for the defendant Iska W. Carmack waives the taking of their depositions and agrees as follows:

"Mr. McNerney: You are going to state your agreement?

"Mr. Kelso: I am satisfied from the statements made [fol. 690] by the attorneys of the Department of Justice appearing here for the plaintiff in the above entitled cause and from the statements made by Counsel appearing for the Federal Works Administrator and also from the testimony of Mr. Witman, that the Postmaster-General, Frank C. Walker, and the Federal Works Administrator, Major-General Philip B. Fleming have no independent knowledge of any facts relating to the selection of the site sought to be condemned in this proceeding other than the fact that they signed the request to institute suit to condemn property for the Post Office and Custom House site at Cape Girardeau, Missouri.

"Under the circumstances I am willing for the record to show the following agreement:

"It is agreed by and between the United States of America, plaintiff in the above entitled cause, and Iska W. Carmack, one of the defendants in the above entitled cause, that this record shall show that the attorney for the defendant Iska W. Carmack, for the reasons already stated in this record, waives the taking of the depositions of Honorable Frank C. Walker, Postmaster-General, and Major-General Philip B. Fleming, Federal Works Administrator.

"Mr. Hasson: Mr. reporter, where is your office?"

Mr. Kelso: I don't care anything about that.

The Court: Is that all of that subject?

Mr. Kelso: Yes, sir.

[fol. 691] Mr. Kelso: I want to offer a deposition.

The Court: All right.

Mr. Kelso: Mr. E. R. Witman, page 124.

The Court: You offered that deposition yesterday, page 44 to the end.

Mr. Kelso: This is page 124.

The Court: Of E. R. Witman.

Mr. Kelso: Of E. R. Witman.

The Court: I have a record you offered commencing at page 44 to the end of the deposition. Is that an error?

Mr. Cooper: Correct, Your Honor.

Mr. Kelso: As follows:

(Deposition).

E. R. Witman thereupon resumed the giving of his deposition in the above entitled matter, and, to questions to him then propounded deposed and answered as follows:

Direct Examination—Continued.

By Mr. Kelso:

Q. "This is Mr. E. R. Witman?

A. "Yes—

The Court: It is not necessary to read the deposition, I will read it. Page 124 to page what?

Mr. Kelso: To page 144.

Mr. Blanton: Do you intend to offer all the Witman de-
[fol. 692] position? That would also include then the portion of this Defendant's Exhibit C beginning at page where you first started into the deposition? In other words, you gave him a direct examination and he was excused a few days, and you called him back and resumed direct examination?

Mr. Kelso: I don't know; that was confused.

Mr. Blanton: There was a third time when you examined, when the Government cross examined. It is understood that all three of those—

Mr. Kelso: The whole depositon, as I understand it, is in evidence. Is that right?

The Court: I did not understand you offered the whole deposition. Of course, you may. On the record yesterday you offered, first, pages 1 to 14, and then pages 1 to 40 of the transcript; and pages 19 to 43 were omitted.

Mr. Kelso: In order to make it a certainty so they won't question whether I have a right to call your attention to it, I am going to read it, but I am going to ask that the entire document that is certified to—

The Court: You offer the entire deposition of E. R. Witman?

Mr. Kelso: Yes, sir.

Mr. Blanton: It begins, Your Honor, at page 53.

[fol. 692-A] (Memorandum Of The Clerk Of The U. S. District Court).

Deposition of E. R. Witman, last referred to will be found on folio pages 428 to 447 inclusive of this typewritten transcript of record.

[fol. 693] Mr. Kelso: Now then, I am going to ask Your Honor for indulgence to let me read this short deposition of R. S. Hart on page 153.

Deposition.

R. S. Hart was thereupon called as a witness for the defendant Iska W. Carmack in the above entitled cause, and the oath having been waived, deposed and answered to questions propounded by Counsel as indicated hereinbelow, and testified as follows:

Direct Examination.

By Mr. Kelso:

(Defendants Counsel read the deposition from line 20 on page 153 to and including line 12 on page 154, when the following occurred:)

Mr. Blanton: In order to make the record, we do not think any of this testimony of this gentleman is competent

because it does not refer to the selection of the site but simply refers to construction to be erected upon the site after it has been selected and acquired by the Government.

The Court: You maintain the entire deposition is immaterial to the issues in this case?

Mr. Blanton: Yes, sir.

The Court: I will rule on it afterwards.

Mr. Kelso: Mr. Meyers put into the record the matter of Mr. Hart or this other architect coming down here and [fol. 694] his authority to investigate, and so forth, and this is the only other man that came down, and I think it is important.

(Thereupon, defendant's Counsel continued to read from line 12, page 154, to and including the answer on line 8, page 169 of the deposition, when the following occurred:

Mr. Kelso: "That is all." Then the cross-examination and recross examination, and so forth, I will not read.

Mr. Cooper: Have you finished with that?

Mr. Kelso: Yes, sir.

Mr. Cooper: Now that deposition would indicate that there are two or three different monuments or something of the kind, and a sun dial. I suppose you will stipulate that the sun dial and the William F. D. Batjer Memorial are one and the same, won't you?

Mr. Blanton: They are.

Mr. Kelso: I guess that is correct. I don't make any point on that. I think so.

The Court: Very well.

Mr. Blanton: In connection with the cross-examination, it is quite short and I would like to read a question or two.

The Court: I will read it all, gentlemen.

Mr. Blanton: I will not burden the Court but I wanted to be sure it is offered.

The Court: Yes, sir, I understand the whole deposition is offered.

[fol. 695] (Memorandum Of The Clerk Of The U. S. District Court).

Deposition of R. S. Hart last referred to will be found on folio pages 528 to 545 of this typewritten transcript of record.

[fol. 696] Mr. Bowman: I would like to ask this question: Are the original answer and amended answer in the original case on file? I understood they introduced the original petition.

The Court: I do not understand that they introduced any pleadings in this case.

Mr. Blanton: All we read was exhibit attached to the original petition because that constituted the original request for filing the suit.

Mr. Bowman: I thought if they were going to introduce the original petition I would like an understanding.

The Court: It hasn't been introduced as far as I know.

Mr. Kelso: That being true, we desire to offer the original petition filed in this case by the plaintiff.

The Court: Very well.

Mr. Bowman: And the original answer.

The Court: Very well, let them be admitted.

(Memorandum Of The Clerk Of The U. S. District Court).

The original petition is omitted here for the reason same will be found on folio pages 3 to 13 inclusive of this transcript.

[fol. 697] Answer Of Defendant Iska W. Carmack.

Now, on this day comes Iska W. Carmack, and enters her appearance as a defendant in the above entitled cause as one of the direct heirs of Louis Lorimier, deceased who is mentioned in the order of Publication filed in the above

entitled cause, and also because she is the [woner] of lots in the City of Cape Girardeau, Missouri, and the owner of lots near the City of Cape Girardeau, Missouri. This defendant also represents to the Court that she is an inhabitant of, a citizen and tax payer of the City and County of Cape Girardeau, Missouri, and for answer to plaintiff's petition for condemnation of the real estate described therein states that it is not necessary to acquire said property for the purpose of constructing and erecting of a United States Post Office and Custom House in the City and County of Cape Girardeau, Missouri.

Further answering this defendant says that the Legislature of the State of Missouri has not given its consent to the condemnation of said property for the purposes stated in plaintiff's petition or for any other purpose as is required by law when public property is sought to be condemned for other public purposes.

This defendant further answering states that the property sought to be condemned with buildings thereon and described in Plaintiff's petition is now being used for public purposes including the use of it by the County of Cape Girardeau as a court house for the use of a court of record, to-wit: The Cape Girardeau Court of Common Pleas, of Cape Girardeau County, Missouri, and is also used by the City of Cape Girardeau, Missouri as a city hall for the purpose of carrying on the business of the City of Cape Girardeau, a city with a population of approximately 20,000 people; and part of said property and buildings thereon are now being used as a public library by the inhabitants of the City of Cape Girardeau, thus making said property and the improvements thereon public property of very much more importance and more necessary to the people of the City and County of Cape Girardeau, Missouri, than the use of same for a post office or [fol. 698] custom house building, and because the said property sought to be condemned is more necessary and more important for the use of the inhabitants of the City and the County of Cape Girardeau the said property is not subject to being condemned by plaintiffs for the purpose of making a change in the public use of said property, and because this suit is an illegal attempt to

unnecessarily change said public property from one public use to another, this defendant prays the court to dismiss said suit.

Further answering this defendant states that said property was deeded, as stated in plaintiffs petition, to the inhabitants of the Town of Cape Girardeau, and owners of lots in and near the same, on the said deed, dated September 11, 1920 and recorded in Book E page 496 of the Land Records of Cape Girardeau County, Missouri and provided that the said lands "granted to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriate to the public uses to which they are respectively intended, and that they, nor any part of them shall never become private property". This defendant asserts that she is a direct Lorimier heir but states that said property was not intended to be used as a post office or a custom house, therefore if said property is condemned for this purpose it will be in violation of the provision in said deed, and for this reason this defendant is one of the parties to whom the title would revert.

Wherefore this defendant, Iska W. Carmack prays that said condemnation proceedings be dismissed, or that she be allowed something for her interest in the property, and costs.

L. L. BOWMAN,
Cape Girardeau Missouri,
Attorney for Iska W. Carmack.

(Endorsed): Answer of Defendant Iska W. Carmack. Filed in U. S. District Court on January 12, 1942.

[fol. 699] Mr. Bowman: The mandate is a matter in this case, of course.

The Court: I do not think you need to introduce the mandate of the Court of Appeals. The Court will try to follow it regardless of whether it is in the record or not.

Mr. Kelso: Counsel for the Government introduced some records or amendments to the petition, and I would like to have the record show that the amended petition is offered in evidence at this time.

The Court: You mean the petition that the case is being tried on?

Mr. Kelso: No, sir; there was an original and then amendment before it went to the Court of Appeals, and of course this present amended petition.

Mr. Blanton: No objection.

The Court: It may be considered in.

Mr. Cooper: Suppose we offer all the pleadings?

The Court: Except the one on which the case is being tried. We will stop there.

Mr. Kelso: It seems to me the petition as originally filed.

The Court: They have all been offered.

(Memorandum Of The Clerk Of The U. S. District Court)

The amended complaint is omitted here for the reason it has heretofore been included and will be found on folio pages 3 to 13 inclusive, of this typewritten transcript of record.

[fol. 700] Mr. Kelso: I want to be certain of the record. Major Hall started to read, I don't know whether it was offered in evidence or not, the deposition of Bartholomew.

The Court: It was offered in evidence, Herman Bartholomew.

Mr. Blanton: I think we were given permission to indicate on the margin, and rather than do that I will make the general objection and ask that the entire deposition be stricken for the reason that it abounds in conclusions or opinions of Mr. Bartholomew which are not binding on the Government, in view of the fact he has nothing to do with selecting the site and doesn't testify to any actions of the Committee which is vested with that authority, and it doesn't pertain to any of the issues in this case.

The Court: The objection at this time will be overruled.

The Court: What next, gentlemen?

Mr. Hall: If your Honor please, we desire to examine Mr. Kelso. That will take quite some time.

The Court: Very well, take a recess until 2:00 o'clock.

Thereupon, at 12:30 P. M. April 19, 1944, Court was adjourned to 2:00 P. M., when the proceedings were resumed as follows:

Mr. Hall: Your Honor please, defendant wishes to offer in evidence decision of the Supreme Court which has been referred to, which interpreted a provision of the deed [fol. 701] of September 11, 1840, which is referred to in the deposition in this case.

Mr. Blanton: Do you refer to the Painter decision?

Mr. Hall: State ex rel Painter. I think it is in the 102 Missouri or the Supreme Court Reports.

Mr. Blanton: To which we object for the reason the opinion of the Supreme Court deal with a different controversy and more particularly with a different parcel of land which was conveyed under conditions entirely different from that involved in this case and would not be binding upon the Court in this action. And for the second reason this condemnation case was brought by the Government which is entitled to condemn the property despite some restrictive clauses which might have been put in the deed originally by the grantor.

The Court: I doubt if it is necessary to offer the opinion in evidence, but let it be received. Objection overruled.

(Memorandum Of The Clerk Of The U. S. District Court)

The opinion referred to will be found under Carmack vs. United States, 135 F (2d) 196.

Mr. Hall: Your Honor has indicated that the Court takes judicial notice of the decisions of the Statutes of the State of Missouri. I understood that was Your Honor's practice?

The Court: Yes, sir; the Court takes judicial notice of the Statutes of the State of Missouri.

Mr. Hall: And that includes Session laws as well, and we particularly want it understood that all Statutes of [fol. 702] Missouri relating to this controversy and the rights of the Government or any other plaintiff to condemn property be understood as offered in evidence, and particularly the Act of the General Assembly of Missouri found in the Laws of 1943 relating to the jurisdiction of the Cape Girardeau Court of Common Pleas.

Mr. Blanton: We do not think they are competent in this case. Any act of the Missouri Legislature would not be a restriction on the authority of the Government to condemn; and in the second place I do not think it is necessary to offer them, if they are competent at all. We think whatever the jurisdiction of the Court of Common Pleas might be, would not affect the right of the Government to condemn in this case.

The Court: I think that is true, but the Court will take judicial notice of the laws of the State of Missouri, unless I am awfully wrong about procedure in the Federal Court.

Mr. Hall: In view of Your Honor's ruling, the defendant will not submit a list of the Statutes because I assume that any of the Statutes of the State of Missouri which we may think are applicable would be considered by the Court and will be taken notice of judicially by the Court.

The Court: I think we understand each other.

[fol. 703] I. R. Kelso of lawful age, produced, sworn and examined, testified on behalf of the defendant as follows:

Direct Examination.

By Mr. Hall:

Q. State your name, please.

A. I. R. Kelso.

Q. Where do you reside?

A. In Cape Girardeau County, Missouri.

Q. Are you a resident of the City of Cape Girardeau?

A. My home is just outside of the corporate limits of the City.

Q. How long have you resided in Cape Girardeau County? A. I think since 1906.

Q. Have you held any position as an official of any of the departments of Government in the State or in the City of Cape Girardeau, or County of Cape Girardeau?

A. I have not.

Q. Do you own property, real estate, in the City of Cape Girardeau, Missouri? A. I do.

Q. For what length of time have you owned real estate in the City of Cape Girardeau?

A. Practically ever since I came here. I do not know just the date I bought it; practically all the time I have lived here.

[fol. 704] Q. State whether or not you pay taxes and continually pay taxes on real estate [illegible] own?

Mr. Blanton: We will [illegible] taxpayer of the City, Mr. Hall.

Q. Reference was made this morning and also yesterday and in the report of the Government's Mr. Deutsche to a 9-foot strip of land lying immediately south of the present post office site, which would be considered as a part of a new or additional site to be selected for the location of the post office, this 9-foot strip to be in connection with the property owned by Mr. Bremermann east of the present post office site. Tell the Court whether you are now owner of that 9-foot strip. A. I am.

Q. Is there any improvement on that strip?

A. There is not.

Q. Is that 9-foot strip available now, and has it been since you acquired it, for the selection or for the use in connection with a new site for the post office here in Cape Girardeau?

Mr. Cooper: Object to that, Your Honor, because there is now showing that he owned it at the time of the selection and it was made available at that time.

The Court: Overruled.

A. It is.

Q. Are you willing, as the owner of that property, to [fol. 705] transfer it to the Government of the United States in connection with the property referred to as the Bremermann property, for the site for the construction of a new Post Office building in Cape Girardeau?

A. Yes; I acquired the property for that purpose and so informed the authorities through Congressman that the—

Mr. Blanton: Just a moment, Your Honor, we object to that. He is now testifying to something he told some Congressman.

The Court: Leave out what you told the Congressman.

A. I wired to Washington that the property was available for—

Mr. Blanton: Object to what he may have wired to somebody in Washington.

A. I will say then that I acquired the property for the purpose of holding it so that it would continue to be available. At the time that I acquired it there was an effort being made to put a little building on that 9-foot strip, and I acquired it, and I am, regardless of the cost of the property to me, willing to let the Government have it at the price which it was offered or at a lesser price if the Government insists or feels that it is not worth the amount that it was offered to the Government for.

Q. Now from whom did you acquire that property?

A. Mrs. Ella Drumm.

[fol. 706] Q. That is the Mrs. Drumm in whose name that 9-foot strip was submitted as a part of the site for the new location of the post office? Is that correct?

A. That is correct.

Q. State whether or not you ever appeared at Washington, D. C. before representatives of the Government there, in connection with the location of a new site or selection of a site for a new post office building at Cape Girardeau?

A. Yes, sir, I did. I want to add that I never appeared there in any capacity as advocating the selection of any particular site, but merely to point out the things that I regarded as hazardous to the project and would cause delay, and offered the services of the Chamber of Commerce to aid the officers or their agents, architects or anybody else in every way possible to select a suitable site, stating to that department that I regarded—

Mr. Blanton: Your Honor, we want to object to what he may have stated to some person or some committee or individual that hasn't even been identified.

A. All right I stated to a committee of which Mr. Reynolds was a member and of which Mr. Meyers was a member, and was there at the time that Mr. Meyers, the Fourth Assistant Postmaster-General, referred to in his testimony in this case yesterday.

Q. That is the same Mr. Meyers that you saw before?

A. Yes, sir.

[fol. 707] Q. Now when was it that you appeared before Mr. Meyers and Mr. Reynolds, or that committee with reference to the selection of a post office site?

A. It was at the time fixed as I think by Mr. Meyers, which was prior to any selection or any recommendations as to any selection of a site.

Q. And when you appeared there, you represented whom?

A. I was the authorized representative of the Cape Girardeau Chamber of Commerce, the organization that Mr. Meyers had—or that Mr. Deutsch said in his report had refused to recommend or take sides in the location of any site. And that action of the Chamber of Commerce was taken upon my advice, and they later adopted a resolution, I think in September of 1940, in which they stated specifically—

Mr. Cooper: We think that resolution would be the best evidence, Your Honor, as to what it states.

A. I have here a copy of the resolution quoted in a telegram which I sent on September 30, 1940, and I know that it was the copy of the resolution made and adopted by the Chamber of Commerce on that day, and it is set out here and quoted. And the telegram, I mean the resolution is:

"Motion made by C. A. H , seconded by Edward J. Bourle, that the Chamber of Commerce go on record that we request the Post Office Department to select a site as soon as possible, and to that end we will agree

[fol. 708] to cooperate with your engineers or architect in the matter of selecting such a site, and that our representative Judge I. R. Kelso be requested to report this action to the proper authorities."

Q. Then after the date shown by that copy of the telegram you have and have just read from, did you go to Washington and appear before this joint committee?

A. I cannot say whether it was before or after the date. It was about that time. This action was taken in anticipation of the visit of architects and investigators for the Government and we were tendering our cooperation and assistance without being in favor of or against any particular site.

Q. Now did you make any statements at that time when you appeared before this Committee composed of Mr.—or including Mr. Walter Meyers, Fourth Assistant Postmaster-General, and Mr. Reynolds, with respect to the selection of the Common Pleas Court House site and the Library site as a place for the construction of another post office building?

A. Briefly, I say that we discussed fully, as I understood it, the matter of the desirability of selecting the Court House site. And I said to them that "this property has been devoted to public use under the Lorimier deed for over 100 years; that it has the Common Pleas Court House and Public Library and other monuments and buildings, and so forth, on the property; that it would be a mistake to undertake to demolish; and that in addition [fol. 709] to that that the Supreme Court of Missouri had held in construing the deed of the Lorimier heirs of September 1820 that the title only vested in the City in trust, and that the City had the right to manage and control the property but no power to dispose of or convey the property. And called specific attention to the fact that while the opinion of the Supreme Court was passing upon one of the tracts of ground described in the deed of 1820, that the Supreme Court, as if to emphasize the lack of authority to convey any property, said that it might just as well be said that the City had the right to convey the public square described and that the property sought to be condemned is a part of that property referred to as the public square in that opinion, and that the Court of

Common Pleas—I mean the Supreme Court had copied the deed into the opinion, so that they would have no difficulty in seeing what had taken place. And that there were any number of available suitable sites that could be used, and while I was not there to advocate any site and would support the department in the matter of acquisition of any site selected, and that I thought that I could safely say that I was voicing the sentiments of the entire community in pledging that support; but that there was no necessity of undertaking to condemn or acquire in any fashion the property known as the Common Pleas Court House property and the Public Library property because of the Supreme Court decision and because of the fact of the law as I understood it that they couldn't [fol. 710] under the circumstances in this case condemn property for public use when there was so much available property that was fitted for the site of the post office.

Q. Now who was Mr. Reynolds that was present there?

A. He is the gentleman that has been identified here as a member of the joint committee.

Q. Representative of the Administrator of the Public Works Agency?

A. I think Mr. Meyers designated him as the representative of the Public Building Committee, as I recall it; but he said it was all part of the same thing. The depositions which were taken in this case at Washington are all in evidence.

Q. Did you at that time present a petition signed by several hundred citizens of Cape Girardeau in opposition to the selection of the Common Please Court House and Park for a site for a new post office building?

A. No, I didn't appear there in that capacity. I only offered to, and presented a paper pledging support of the community in the matter of selecting a suitable site; and at that time I said to them—

The Court: The question was, did you present this petition?

A. I think that it was mailed. It was there when I was there, and whether I carried it with me on the train, or whether I had already forwarded it by mail, I am not [fol. 710a] sure. I caused it to be filed in any case.

Q. There was such a petition presented to this joint committee there at Washington? A. It was.

Q. Now Mr. Kelso, did you receive a letter from the Mayor of the City of Cape Girardeau about June 19, 1940, referring to your interest and activity in endeavoring to have a new post office building erected at Cape Girardeau?

A. I did.

Q. Is this letter that I hand you, dated June 19, 1940, the letter which you received?

A. That is a photostatic copy of the letter.

Q. A correct, true photostatic copy of it?

A. It is.

Q. I will ask you if this letter that I have just referred to and which has just been read by Counsel for the United States is on the letterhead of the City of Cape Girardeau, Missouri?

Mr. Cooper: The letter speaks for itself, Your Honor.

A. I am sure it is. I know it is signed by Mr. Statler, who was then Mayor.

Q. Will you read that, please?

Mr. Blanton: We object to the competency of the letter. It is simply a letter from the Mayor of the city to the witness, dated June, 1940. I do not see where it would shed [fol. 710b] the slightest light on the question in controversy here. It would not be binding on the Government at all.

The Court: What is the purpose?

Mr. Blanton: Just a letter of commendation to Mr. Kelso from the Mayor, is all it is.

Mr. Hall: Your Honor, there has been quite a good deal brought into this case, apparently for the purpose of casting some doubt or reflection upon the interest and activity of Mr. Kelso in this case, and I think that this letter from the Mayor of the City dated at that time is competent to show what the attitude of the City at that time was with reference to Judge Kelso and his interest in this project.

The Court: The Court of Appeals has held this defendant had the right to intervene and contest, and the right of the Government to maintain this condemnation

proceeding, and if any effort has been made to question the motive of one of the Counsel, it has not registered on the Court.

The Witness: I do not want to volunteer anything, but in answer to that suggestion of Counsel, one pointed to the property south of this building as having been acquired by me and owned by me when I was at Washington, and the question asked and the answer given by the Fourth Postmaster-General with respect to my interest being disclosed when I was down there—

The Court: To cut the matter short, I will permit the letter to be received in evidence. Proceed.

[fol. 711] (Defendants' Exhibit L,—4/19/44 AP.)

Commissioners
Raymond E. Beckman
Supt. Department Of Accounts
And Finance And Parks And
Public Property.
Philip H. Steck
Supt. Fire Department And
Department Of Public Safety.
Frank Batchelor
Supt. Department Of Streets
And Public Improvements.
Albert Schultz, City Treasurer
R. B. Oliver, III, City Atty. & Counselor
John R. Walther, City Engineer
E. W. Hirsch, Chief Of Police
Paul E. Kaiser, Police Magistrate
C. C. Summers, Health Officer
Robert Kammer, Fire Chief
W. C. Blair, City Assessor
J. W. McCullough, Street Commissioner

City Of Cape Girardeau, Mo.
Commission Form
Hinkle Statler, Mayor
Superintendent Department Of Public Affairs
Wm. C. Kaempfer, City Clerk
Verna Lee Landis, Deputy City Clerk

June 19, 1940

Honorable I. R. Kelso
First National Bank Building
Cape Girardeau, Missouri

My dear Judge Kelso:

I wish to express to you as a city official as well as personally my sincere congratulations on your recent successful endeavor in securing for the City of Cape Girardeau the necessary appropriation for a new Federal building.

To my knowledge there has never been a greater achievement made by any one individual for the progress and betterment of our community. It is indeed gratifying to know that we have a man in our city who has the ability and civic desire to accomplish such a measure as you have recently accomplished.

I hope you will see your way clear to continue your splendid work in the selection of a suitable location for the erection of this building. Any effort begun in such a splendid manner should be finished in the same way, and it is my feeling that since you accomplished this matter single handed after everyone else had apparently given up hope of such an accomplishment that you are the one individual to carry out the location of a site for the erection of this fine new building.

Sincerely yours

HINKLE STATLER
Mayor

HS:EN

[fol. 712] Q. Now Mr. Kelso, you are a practicing attorney in this community, are you?

A. Yes, sir.

Q. Is this building that has been referred to as the Court of Common Pleas Court House and Court House Park in use, and has it been continuously in use in the trial of cases in Cape Girardeau County for many years past and until the present time? A. It is.

Q. The jurisdiction of the court, of course, is defined by law; is it a court in which there are many cases tried

and large numbers of people assembled to participate in or to hear the proceedings in trials of cases?

Mr. Blanton: Your Honor, we object to that. We do not think it has anything to do with the case; and if it did, that is not the way to make the proof. The records of the Court are the best evidence of that.

The Court: Overruled.

A. That is true.

The Court: Do you know whose responsibility and duty it is to furnish quarters for the Cape Girardeau Court of Common Pleas, by law? Can you tell me offhand?

A. I have understood from my knowledge of the operation of the business since I have been here, that it is the [fol. 713] duty of the City to furnish the building, and that it has been maintained largely by the County. Now then, that has been sort of a tradition. I think the law requires the County Court and the City to arrange, but there is no precedent that I am able to pass on to give to you as authority for it. I think that the City is responsible, and I think the County is responsible.

By Mr. Hall:

Q. Reference has been made to the Public Library that is situated on this tract of ground known as the Court House Park. Is there any other public library in the City of Cape Girardeau to which the public generally go, except that building?

A. No.

Q. And except that library? A. No.

Q. There is not? A. There is not.

Q. I am not sure that the record on this trial shows, but I would like to ask you to state whether there is any public street on the north side of this immediately adjoining this Court House Park?

A. There is none.

Q. Is there any public street on the south side, immediately adjoining this public park? A. No.

[fol. 714] Q. On the east side of this public park, this Court House Park, is the street that has been described as Spanish Street, is that correct?

A. Yes, sir.

Q. And on Spanish Street the entrance to this court house is up a number of steps and terraces until you finally reach the level of the ground upon which the court house is built? Is that correct?

A. That is correct.

Q. About how many steps are there from the walk on Spanish Street up to the court house?

A. There is a series of terraces. I think the number of steps, some of them on the terraces, would be walking on the level; so the number of steps I think couldn't be more accurately stated. But they would be said to be probably 60 or 65 climbing steps from Spanish Street to the level of the entrance of the present building.

Q. In going over that space there would be certain level places between the flights of steps?

A. It is just a series of terraces.

Q. Now does this property which the Government seeks to condemn in this city extend to the east line of the Park? That is, to Spanish Street? or does it leave those terraces and steps still unappropriated?

A. The Government in this proceeding does not de- [fol. 715] scribe the property sought to be condemned as being property that would go any further east than the first or top terrace on the east side of the present Court House building, so that all of the ground between—all of the terraces are excluded from the condemnation.

Q. Now Mr. Kelso, you went to Washington about the time that telegram was sent, that you read or from which you read, as the representative of the Cape Girardeau Chamber of Commerce, did you?

A. I would say that that is not it altogether. I had been vitally interested in the securing of the money with which to build a post office, and had been vitally interested in geting the site selected, and had spent approximately a month or more in Washington after the Post Office Department had announced that there would be no funds available until there could be an appropriation, a deficiency appropriation, and that would be difficult to get. Then I went to see General Farley and stated to the General, who was Postmaster General, that I was interested in the matter and would like to interest him in finding enough money to erect a new post office building to which the City was already found to be entitled, as a memorial

to Julian N. Friant, a former citizen of Cape Girardeau and up to the time of his death had been for a number of years an Assistant to the Secretary of Agriculture and the man who had probably taken a more active part in the [fol. 716] matter of assisting the community in the selection or getting the site than anyone else.

Q. In getting an appropriation for the building?

A. In getting the Department to go into the facts for the purpose of ascertaining whether the town itself was an eligible city and entitled to it.

Q. Now you have your law office in the building of the First National Bank on the west side of Main Street in Cape Girardeau, have you?

A. I do.

Q. And have had it there for quite a while?

A. Yes, sir.

Q. Did you ever have any official position in connection with the Chamber of Commerce of Cape Girardeau?

A. Yes, sir; I was president of the Chamber. I have acted on committees ever since I was here, more so than I have been in the last few years, because this particular transaction is about the only matter that I have taken an active interest in, especially for several years.

Q. When did you first become an attorney in this condemnation proceeding?

A. At the time that the case was being heard in this Court on the original petition. And I was called to the court house and Judge Bowman, who was attorney for Mrs. Carmack, announced to the Court—

[fol. 717] Mr. Cooper: He says he was called. Let's have him tell who called him.

A. I said Judge Bowman called me.

The Court: I do not think the question of who employed the attorneys and when employed, or whether they worked on a contingent fee or straight fee is going to help this Court in determining whether or not the Government acted arbitrarily in selecting this post office site.

Mr. Kelso: As a witness it might not be proper to say that I agree or disagree. I felt that way, and the only interest I had was that I felt more keenly than the Court would, or anyone else, the insinuations and implications that I was in this case for a fee from anybody, when I am not.

The Court: A lawyer has a perfect right to work for a fee, and if he chooses to work for something other than a fee I do not think that is material in this case. The case is going to be decided as nearly as the Court can according to the law. And let's pass up the question of who employs attorneys and who pays and conditions under which they work. They are on both sides Honorable Counsel and members of the bar, and both sides ought to be represented. Let's put an end to that subject and get on to something else that has something to do with the merits of this case.

Mr. Hall: Judge Kelso, were you ever a member of any commission, Governmental commission, that had the [fol. 718] duty or responsibility of locating parks?

Mr. Blanton: We do not think that makes any difference whether he had or whether he didn't have. He was not appointed on this committee to select a post office site.

The Court: What was the question? He was on the commission to select a park?

Mr. Hall: Whose duty and responsibility was to view and select parks.

The Court: I do not know what you are leading up to. I overrule the objection at the present time.

A. Well, I assume that you are referring to local committees?

Q. Any committees, general [commites] or any committees?

A. As president of the Chamber of Commerce I headed the Committee years ago to inspect parks all over the city and try to put in a development of parks in this City, and succeeded in a measure because at that time they had none. And at that time I said to Mr. Reynolds and his associates that we needed more parks rather than to destroy the parks we had, and that my chief interest in it was to see that people were not discouraged in the development of parks unless there was some extreme necessity that demanded it.

Q. Have you had any connection with the Mississippi River Parkway Planning Commission?

[fol. 719] A. I have been a member of that committee ever since it was organized.

Q. Well, in that connection—

A. While in that connection it was my duty to try with other members of the Committee to interest the states and their legislators, lying along the Mississippi River, to enact laws that would enable them to acquire park sites along the Mississippi River and to get Congress to pass a law or an enabling act. And I did in that capacity go to Iowa and to Minnesota and Illinois, and the Missouri Legislature, and Arkansas and Tennessee, and all up and down the river and spent probably months in trying to get their Congressmen to introduce the bill, which they did in that case. Now that was simply my interest in the public parks up and down the river, which included Cape Girardeau.

Q. Now is the Mississippi River within the view of this present Court House Park for those who wish to occupy seats or settees facing to the east?

Mr. Blanton: We dont want to cut out anything that is competent. It looks like we are cluttering up the record with stuff that certainly doesn't touch any of the issues here. The Government is only seeking to condemn that portion of the Park which goes to the top terrace; and all the rest of the park to the east they can look it the river just as much and as often as they want. A substan- [fol. 720] tial portion of the park is to the north of the part we are seeking to condemn, and a substantial portion to the south. That will remain in the city for people who want to look.

The Court: How much of the Mississippi River can be see from this so-called park?

A. Well, all in front of the Court House proper can be seen from the terrace, and of course when you are on the floor of the court house you can see up and down the river in any direction.

The Court: The Court would like to inquire of Counsel if that plat that has been offered in evidence shows what part of the park site is being condemned?

Mr. Blanton: It does, Your Honor, my recollection. At least we have a plat here, if that one doesn't, that is attached to the original petition. It shows the area of the entire park.

The Court: I understand you to say it goes to approximately the top step of the terrace?

Mr. Blanton: That is correct.

The Court: Does it run to the park line on the north?

Mr. Blanton: No, sir; it goes to a point 100 feet north of the center line of Themis Street.

The Court: Will you tell me how close it goes to the east and north and south sides?

Mr. Blanton: It takes off the south three or four feet [fol. 721] of that bandstand, and I think we have a plat, if we can get that plat here.

The Court: Suppose you get that. The Court would like to have that information. Proceed, Mr. Hall.

Mr. Cooper: If I may interrupt just a moment here. This deed from Lorimier to the Board of Commissioners and Assessors provides that this park will be divided into two equal parts by Themis Street, each having 326 feet 3 inches in length, east and west, by 231 feet 6 inches and a half in breadth. That is, from the center line of Themis Street the park extends each way 231 feet 6½ inches. Now this proposed plot we are condemning takes the south 100 feet of this north 231 feet and 6½ inches. It would leave 131 feet 6½ inches north of the tract we are taking in the park.

The Court: On the north side would be a strip how wide?

Mr. Cooper: It would leave 131 feet 6½ inches.

The Court: On the north side?

Mr. Cooper: On the north side.

The Court: How about the south side?

Mr. Cooper: On the south side it is the same distance from the center line of Themis Street, and we are taking 180 feet south of the center line of Themis Street, which would leave 51 feet 6½ inches.

The Court: Does it take to the sidewalk on the west side?

Mr. Cooper: That is right.

The Court: Let me see if I understand it. You take [fol. 722] all of what the defendant referred to in this rec-

ord as the park site on which the present Court of Common Pleas is located, except a strip of ground approximately commencing at the top step on the east side to the east line of the present property?

Mr. Cooper: Yes, sir.

The Court: And you take all except a strip approximately 131 feet.

Mr. Blanton: 150 feet, Your Honor, according to this plat.

The Court: On the north side?

Mr. Blanton: 150 feet.

The Court: Leaving a strip approximately 150 feet 6½ inches along the north side of the present park? Is that right?

Mr. Blanton: Yes, Your Honor.

The Court: And you leave a strip—

Mr. Blanton: Approximately 84 feet on the south side. Now here are the two plats. This plat was filed.

The Court: I assume it is stipulated those figures are approximately correct?

Mr. Hall: I don't know, your Honor. Speaking for myself, I have tried to find out from this description but I have come to the conclusion that nobody but a surveyor—

The Court: Let's have this understanding: These figures show they are correct, and if you find out they are not correct, the record will be corrected.

[fol. 723] Mr. Blanton: That is agreeable to us.

Mr. Kelso: I suggested to the City Engineer that he was the only party, and that he be here as a witness. He was out and I haven't been able to get him here this afternoon. It all shows he made a survey and will be able to give it.

Mr. Blanton: Those figures were taken from the blueprint by the City Engineer.

The Court: If Counsel find the figures are incorrect, let me know.

By Mr. Hall:

Q. Mr. Kelso, did you have any conversation with any representative of the Government, the Department of the Administrator of the Federal Works Agency or the Post Office Department about this matter, other than this conference you told about in Washington?

A. I had a conference with the gentleman referred to by Mr. Meyers as one of the architects that came down here.

Q. Mr. Tucker?

A. Mr. Tucker, and then I also had a conference with others, with Mr. Roome, the gentleman that he said came down here.

Q. What was the conversation you had with each of those men with reference to the selection of a site?

Mr. Blanton: In order that we may make our record we want to object to any conversation he might have had with these two gentlemen, Mr. Roome and Mr. Tucker, because it would not be binding on the Government. [fol. 724] They were not in a position of authority to select the site. They were to investigate the lay of the land and report to their superiors who were the selectors of the site.

The Court: I do not think it would be binding on the Government. Objection will be sustained. You asked about a conversation with Mr. Meyers in that question?

Mr. Blanton: No, he didn't.

The Court: When the two architects, Mr. Tucker and who?

Mr. Blanton: Mr. Roome.

Mr. Hall: Who were the men mentioned in the testimony of Mr. Meyer yesterday as being the men whom he had sent out here in connection with this post office site selection?

The Court: Mr. Meyer didn't testify he sent them out to select a site, did he?

Mr. Hall: No, sir, he didn't say to select a site, but he sent them out here as a representative of the Government, Mr. Tucker to look at the proposed site and to see

what he thought would be the best way to improve it for a post office.

The Court: That is my recollection.

Mr. Hall: I thought that is what Mr. Meyer's testimony was, and we would like to show and will show by this witness if permitted.

The Court: I sustained the objection. If you want to make your offer of proof, proceed.

Mr. Hall: Judge Kelso, I would like for you to state [fol. 725] what we offer to prove as the statements made to you or in your hearing, by this Mr. Tucker referred to.

Mr. Cooper: We object to that, it is not an offer of proof.

The Court: He is asking that as an offer of proof. Proceed. He could slip up there and whisper in his ear, but we will save time.

A. At the time of the visit of Mr. Tucker, A. H. Tucker, I think, referred to in the testimony of Mr. Meyer, I in the capacity as—

Mr. Blanton: What Mr. Tucker might have said and what Mr. Kelso was doing or the capacity in which he was acting—

The Court: See if you can answer the question.

Mr. Hall: State what we offer to prove as the statement made by Mr. Tucker.

Mr. Kelso: Mr. Tucker stated to me and others that he was here as the representative of the Government to investigate the sites for the purpose of recommending a suitable site to be selected for the post office site. After making that statement I said to Mr. Tucker—

Mr. Cooper: Objection to what he said to Mr. Tucker, the offering is relative to what Mr. Tucker said.

The Court: Overruled.

Mr. Kelso: I said to Mr. Tucker that we were ready to cooperate with him in going over and looking at the sites. [fol. 726] Mr. Tucker said, "I am developing a plan for

study as to the development of the present park site, Court House Park site." He said that they were going to be able to get along without any entrance and so forth on the south and east and north of the property. He said that the Library Building would not be included in the condemnation, and that he was making a plan for a drive entering the property on the south of the Library building to enter the grounds for the purpose of getting in with trucks and so forth to the post office. Now as I understand it, any further discussion is ruled out.

Mr. Cooper: We want to renew our objection to the offering now.

The Court: Sustained.

By Mr. Hall:

Q. Did you have any conversation with Mr. Roome, who was referred to in the testimony of Mr. Meyer yesterday, with reference to the selection of the Court House Park or as to why that park was selected or that location was selected? A. I did.

Q. What did he say?

Mr. Blanton: We want to make the same objection to the conversation that he might have had with Mr. Roome that we made to the other.

The Court: It is before the Court. I think this is the quickest way to get by with it. Overruled.

[fol. 727] A. Mr. Roome stated that he was authorized to come to Cape Girardeau by the Federal Works Agency to carry on in the capacity of a liasion agent or representative of the department, and that unless the people of Cape Girardeau wanted to accept the Court House site that they wouldn't get a post office.

Mr. Hall: You may inquire.

The Court: Is this plat an exhibit?

Mr. Blanton: We are going to offer it, Your Honor. We can have it identified and offer it now.

Mr. Cooper: Let's do that lest we forget it.

(Memorandum Of The Clerk Of The U. S. District Court).

The plat referred to is U. S. Exhibit #11 and has heretofore been included in this typewritten transcript of record and will be found on folio page 731.

[fol. 728] Mr. Hall: If the Court please, I desire to call Judge Kelso's attention to a conversation that he had. I will ask you to relate a conversation that you had with Mr. Reynolds, representative of the Administrator of the Federal Works Agency, with reference to the selection of a post office site at Cape Girardeau.

A. Well, I had two different coversations; one was at the time that Mr. Meyers referred to at a meeting, and the other was at the time of the taking of the depositions in this case.

Q. State what Mr. Reynolds said to you at either of those times.

A. At the time of the hearing before him Mr. Reynolds said that the Court House site lacked some of the advantages that they required usually in the selection of a post office site and that the building now used as the post office site was a one-purpose building; that it was upon the terrace; that it would have no value for commercial purposes, and that because the City had represented to them that it was practically or substantially a unanimous wish of the City to make the exchange, that they were influenced to make the exchange because they had been advised that they would be permitted to use the present building until the new building was completed and ready for occupancy, and that he couldn't say that it might not [fol. 729] be a mistake to make the selection, but that he wanted me to know that that was the thing that influenced him to consider the exchange of the property.

Q. When you say the provision "by permitting them to occupy the present building," you mean this present post office building? A. That is right.

Q. That is what he was referring to?

A. That is right.

Q. Now another conversation you say you had with Mr. Reynolds?

A. At the time of taking of the depositions at Washington, commencing on November 1st and on.

Q. Last year?

A. Last year; I had a conversation with Mr. Reynolds and was inquiring of him as to whether he would be able to testify in the form of a deposition as to what the Deutsch report contained, or whether he would be willing to consent that the Deutsch report be offered in evidence, and Mr. Reynolds stated that the objection had been made that they would probably have to take other property, and if so the valuations fixed in the Deutsch report and the names of the appraisers might be to the disadvantage of the Government, but that he was perfectly willing to agree to the use of it because it had been made so long, [fol. 730] conditions had changed so greatly, maybe that it would be of little value, and that he was perfectly willing to let it be offered in evidence, and said the committee and the Department may have made a wrong decision, maybe a bad wrong decision in the making—in attempting to make the exchange. But that was the reason they had been influenced in making any, as I said before.

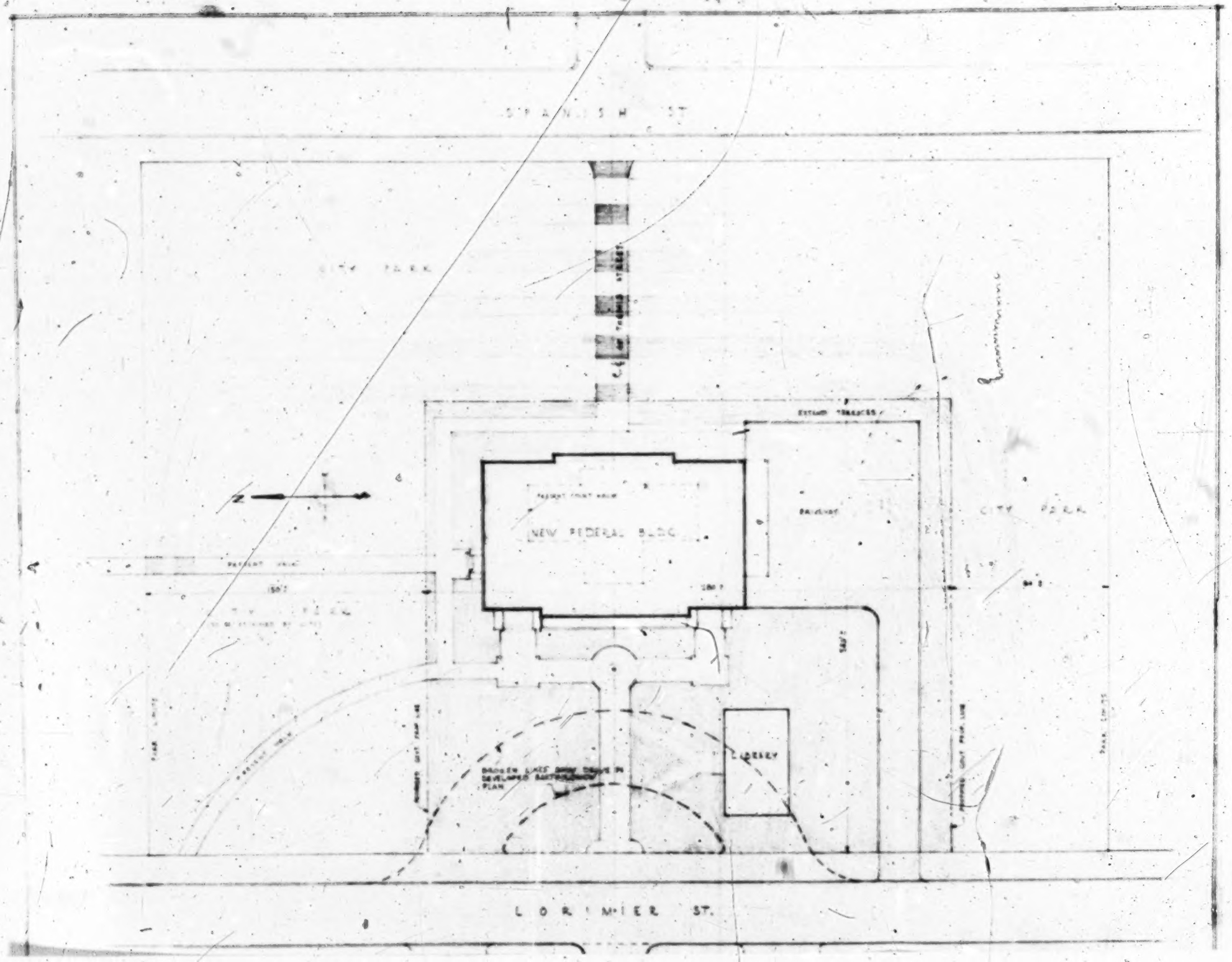
Mr. Hall: You may inquire.

(A plat is marked "U. S. Exhibit 11").

Mr. Blanton: In order that the record may be complete we would like to offer Government's Exhibit 11, which is the plat showing the location of the site that we are condemning superimposed upon the entire City Park, with the lines and distances and areas. It seems to have been offered in evidence during the first hearing of this matter.

The Court: Let it be received.

(United States Exhibit 11, -- 4/19/44 AP.)



[fol. 732] Mr. Cooper: I will ask this photograph be marked "U. S. Exhibit 12". (The photo is marked as requested)

Mr. Cooper: And this photograph marked "U. S. Exhibit 13". (The photograph is so marked)

Cross-Examination.

By Mr. Cooper:

Q. Now I hand you United States Exhibit 12, which I identify as a photograph of the Library Building, together with the monument immediately adjacent to Lorimier Street on the site being condemned, and ask you if you recognize those?

A. Recognize what, Mr. Cooper? those monuments?

Q. Yes, sir; is this the Library Building?

A. Yes, sir; I am sure that is the Library Building.

Q. North side of the Library Building?

A. Yes, sir.

Q. Is this monument just in front of it the Batjer monument or the sundial?

A. I think so; that is what the evidence already shows, it is in front of it.

Q. And is this pedestal to the right of the monument there, or the right of the Library, is that the other monument that is mentioned in evidence here?

A. It looks like the monument, but it was taken at an angle that doesn't appear to show the Common Pleas Court House. Maybe it is because, as I recall it, it is [fol. 733] actually in front of the Court House.

Q. The Common Pleas Court House is back to the left?

A. That is what I say, but I don't know. I presume that is the same. Everything looks like it. I have no doubt but what that is the monument.

Q. Well, is that a fair representation now? That photograph, a fair representation of the things which appear in that photograph? A. I think so.

Q. Now I hand you United States Exhibit 13, which I identify as a photograph of the bandstand, showing a little of the Common Pleas Court House on the left, the north portion of the Library in the background in the center part and showing the top of this monument through the bandstand. Do you recognize that?

A. Yes, sir; that is the bandstand.

Q. Is that photograph a fair representation of what is shown in the photograph, Mr. Kelso?

A. I would say, Yes; but I would like to add that the photograph taken, whoever took that, took that at an angle and in a way that it doesn't in my opinion reveal the true picture of the situation as it existed ever since I have known it. It doesn't indicate anything in the picture, the inclusion in one picture of the buildings involved in this condemnation proceeding.

[fol. 734] Q. Well, it would take a pretty large picture to photograph that whole park showing everything in its relative position, would it not Mr. Kelso?

Mr. Hall: Object to that as immaterial, Your Honor, how big a picture it would take.

The Court: Sustained.

Mr. Cooper: Very well.

Q. Now that monument that is shown through the bandstand in Exhibit 13, and shown in its entirety in Exhibit 12, what is that monument, what does it represent, if you know, Mr. Kelso?

A. I had rather leave it to the record in this case because the parties who were maintaining for that put it all in the record. It seems it was put up by some association that is a party to this suit. The attorney of record in the case is now dead. I didn't have anything to do with the representations of it. It is some war organization that had that put up there and some auxiliary that were interested in maintaining it, and they were parties to this suit.

Q. Well, I will ask it this way, then: Do you know to whom that monument, if it be a monument, is dedicated?

Mr. Hall: Object to that; it was not brought out in direct examination and not responsive to anything brought out.

The Court: Overruled.

A. What do you mean "to whom it was dedicated?"

[fol. 735] Mr. Cooper: If he wants to be evasive about it.

Mr. Hall: Object to that statement as absolutely unfair and uncalled for.

Mr. Cooper: I will withdraw the question.

Q. Now, Mr. Kelso, it was on November 19, 1940, when you appeared before the Committee, wasn't it?

A. If you say so, I assume so. I said it was in November. I don't know.

Q. Well, that is the date that is testified to by Mr. Meyers, isn't it?

A. I am willing to agree that that is it.

Q. At that time you are not sure whether you took that petition to the Committee, or whether it was already there? Is that right?

A. That is right. I think that I took it, and I know we had it before the Committee while I was there. Now the technical question whether I carried it in there with me or whether it was mailed, I do not know. Of course, I was not the party that got it up.

Q. Now at that time, as I understand your testimony in chief, you were not appearing in favor of or as an advocate of any particular site. You were just opposing the particular site? Is that right?

A. I can't say that is right. I say that I said to them, [fol. 736] "I will make it as strong as I know how, any site that is selected fairly with the consent of the people will be entirely satisfactory to me, but I think that it is unfair to the City, so far as the Governm[redacted] concerned, to undertake the condemnation of the Co[redacted]ouse property when there is so much available [redacted]rty, but if you will ascertain the sentiment of the people in a fair presentation of the facts at any election held, that can be held under the law of the City, and it is fairly presented and fairly carried, I will not say another thing about it.

Q. Now that was in November, 1940 wasn't it?

A. Whenever it was, yes, sir.

Q. And an election was held on March 4, 1941, was it not?

A. I think not. No such election as was contemplated. There was a representation by Mr. Tucker, as indicated by Mr. Heck on the stand yesterday, that the condemna-

tion did not in any way affect the Library Building, and that it would continue on as it is.

Q. Well, it is reserved, the Library Building is reserved from the condemnation, isn't it?

A. That is the argument, but the contract shows on its face, a deposition taken in Washington in this case shows that the contract requires them to remove it upon thirty days' notice, and the man said that it might be [fol. 737] removed even before the building was completed; that it was only staying there for the convenience of the Court. And that was not revealed in the sale, but the contrary was revealed. And I insisted then that it would be more disturbing to try to hold that sort of an election than it would be to arbitrarily take it and go on; but that I would consent to that sort of a proceeding.

Q. Now on November 19th when you appeared before the Committee, the site had not then been selected, had it?

A. I don't know. But in fairness to myself I want to say that the reason I make that statement is that I didn't know that the site had been selected when Mr. Tucker came here and Mr. Roome came here, until long after. So I don't know when it was selected and didn't know then whether it was selected or not, but I was acting on the assumption they were considering the trade. And if I had known they had already selected and even thought they had selected it, I of course would not have appeared before them, after a thing had been selected. So I assume that it was not, but I don't know.

Q. Now on November 29, 1940, you wrote that letter to Mr. Reynolds, didn't you?

A. Of course I wouldn't know about that; that is my signature on my stationery, and I know I wrote a letter at that time. And so far as I am concerned it states about the recollection that I have of my feeling about it. And if [fol. 738] they had even pretended in good faith to carry out, regardless of the Statute, the holding of a fair election under the facts and representations as to what—

Mr. Blanton: We ask that all that be stricken. The question asked him was, did he write the letter, and plaintiff asks it be stricken.

Mr. Kelso: All right.

The Court: Were you representing Mrs. Carmack?

A. I was not.

Q. (Mr. Cooper) Are you representing her now?

A. I am appearing in the case as one of the attorneys of record for Mrs. Carmack under the circumstances that I attempted to state a while ago when I said that I was called to the Court House, and Judge Collet asked me, after the thing had gone along a little bit, if I objected to letting my name be entered on the record as one of the attorneys of record in the case of Mrs. Carmack. And I stated to the Court that as a citizen, as a taxpayer and everything else, I was very vitally interested, and if the Court felt that it would be proper and necessary for me to enter my appearance of record in the case, he could let it be entered. And he said to let the record entry show that. Now I had been asked by the parties to appear in the case and I didn't want to get involved in any litigation.

(Three sheets of paper are marked "U. S. Exhibits 14, 14a and 14b, respectively)

[fol. 739] The Witness: I want Counsel to understand and the Court to understand that without discussing the employment, it had been my understanding since that date that I was one of the attorneys of record for the defendant Iska W. Carmack in this case and acted accordingly. And that was before this case started.

The Court: Let's get off the subject there.

The Witness: All right.

Mr. Cooper: I would like to offer United States Exhibit 14 in evidence, which is identified by the witness Kelso, together with 14a and 14b, being a copy of a Western Union day letter signed by I. R. Kelso, Chairman General Public Committee on Building Site, L. L. Bowman, General Secretary on Public Committee on Building Site, and S. F. Lail, Presiding Judge of the Cape Girardeau County Court.

Mr. Blanton: We would like to call for this and substitute a photostatic copy because this is an original departmental record.

The Court: Very well.

Mr. Hall: If the Court please, when Counsel for the Government showed this letter to Judge Kelso, and when it was handed to me and I read it, I did not read these two attachments.

Mr. Blanton: We have no objection to your reading them now.

[fol. 740] Mr. Hall: I do not know whether Judge Kelso read them or not.

Mr. Kelso: No, sir; I was only asked about the letter.

The Court: Very well, read them and make your objection if you have any.

The Court: We will take a brief recess. (3:30 P. M., April 19, 1944)

Mr. Hall: If the Court please, I want to offer an objection to the reading of that letter.

The Court: Very well, I will hear it.

Mr. Hall: The objection is this: That it is not in response to anything that was brought out on the direct examination of this witness. And further, there is no evidence here that at that time the witness I. R. Kelso had any official position or was authorized to represent any person in connection with the matter.

The Court: I will read the letter and rule on the objection. I do not know what is it in.

I. R. KELSO
LAWYER
FIRST NATIONAL BANK BLDG.

CAPE GIRARDEAU, MO.
P. O., CT. H. [illegible]

CAPE GIRARDEAU, MO. November 29, 1940

US Ex 14
4/19/44
AP.

Honorable W.E. Reynolds

Administrator	~~WM-RE-F-FS~~	CM-S
Commissioner	Legal	P & SC
Mr. Barton	SA	BM
Personnel	SE	Pub. Rel.

TO	INITIAL	DATE IN	DATE OUT	COMMENT
Mrs Bell				

NOTED, ACKNOWLEDGED ANSWERED

Fo[illegible]-52-A

ngs

on

Re selection site + 2347

REF: New Federal Building
at Cape Girardeau, Missouri P.O.

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s Courthouse, the property of Cape
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which was constructed with moneys re-
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of Cape Girardeau.

and am anxious to cooperate in every
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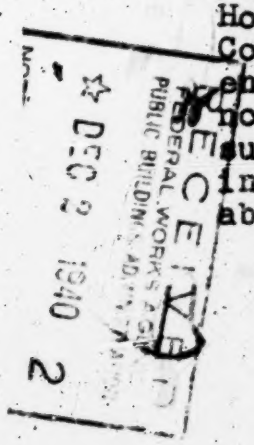
NOTED.	ACKNOWLEDGED	ANSWERED

Fo[redacted]-52-A

...ty officials claim that a majority ... of the city's proposition. On the other hand, those opposed to the city's proposition claim that a majority of the citizens are against it. I am confident that a vote on the city's proposition would end all controversy and that everyone would be satisfied, regardless of whether the majority vote was in favor or against the use of the Courthouse site for the Federal building. Under the circumstances, the writer, as Chairman of a Committee of 100 citizens interested in promoting harmony, joined with Honorable L.L. Bowman, Judge of the Common Pleas Court, who is Secretary of said committee, and with Honorable S.P. Lail, Presiding Judge of Cape Girardeau County Court, in sending telegram of this date, copy of which is herewith enclosed, suggesting an election. I hope that this suggestion is not inconsistent with the policy of the Federal government in such matters, and that the holding of such an election will not in any way interfere with the plans of your committee in the above matter.



Yours truly,

J. R. Kelso

irk.s

(United States Exhibit 14.) 507

I. R. KELSO
LAWYER
FIRST NATIONAL BANK BLDG.

CAPE GIRARDEAU, MO.
P. O., Cape Girardeau, Mo. (R.F.D.)

CAPE GIRARDEAU, MO. November 29, 1940

US Ex 14
4/19/44
AP.
Re selection site - 2342

Honorable W.E. Reynolds
Commissioner of Public Buildings
Federal Works Agency
Public Buildings Administration
Washington, D.C.

Rev P.O.

My dear Mr. Reynolds: REF: New Federal Building at Cape Girardeau, Missouri

Every citizen of Cape Girardeau is primarily interested in seeing construction started on the new Federal Building as soon as possible. The city's proposition to the government has brought out the following facts: (1) the city's proposition requires the city to dispose of the Common Pleas Courthouse, the property of Cape Girardeau County; (2) the city's proposition requires the city to convey the Public Library which was constructed with moneys received from the Carnegie Foundation and private subscriptions; and (3) the city's proposition requires the city to convey the major portion of the park, which belongs to the inhabitants of Cape Girardeau and not to the city of Cape Girardeau.

I am fearful of delays, and am anxious to cooperate in every way that I possibly can to bring about a speedy selection of a satisfactory site.

(Unl

I am fearful of delays, and am anxious to cooperate in every way that I possibly can to bring about a speedy selection of a satisfactory site.

I am informed that the city officials claim that a majority of the citizens are in favor of the city's proposition. On the other hand, those opposed to the city's proposition claim that a majority of the citizens are against it. I am confident that a vote on the city's proposition would end all controversy and that everyone would be satisfied, regardless of whether the majority vote was in favor or against the use of the Courthouse site for the Federal building. Under the circumstances, the writer, as Chairman of a Committee of 100 citizens interested in promoting harmony, joined with Honorable L.L. Bowman, Judge of the Common Pleas Court, who is Secretary of said committee, and with Honorable S.P. Lail, Presiding Judge of Cape Girardeau County Court, in sending telegram of this date, copy of which is herewith enclosed, suggesting an election. I hope that this suggestion is not inconsistent with the policy of the Federal government in such matters, and that the holding of such an election will not in any way interfere with the plans of your committee in the above matter.

Yours truly,

J. R. Kelso

irk.s

RECEIVED
FEDERAL WORKS AGENCY
PUBLIC BUILDINGS ADMINISTRATION
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WESTERN UNION DAY LETTER

US F 142

Cape Girardeau, Mo.
November 29, 1940

Honorable W.E. Reynolds
Commissioner of Public Buildings
Federal Works Agency
Public Buildings Administration
Washington, D.C.

WHEREAS a committee of 100 representing a citywide movement to harmonize all phases of public interest involved in the selection of a suitable site for a Federal Building at Cape Girardeau, Missouri, is desirous of avoiding delays which might result from the acceptance by the Federal Government of the proposal of the Mayor and Commissioners of Cape Girardeau without the consent of the people of Cape Girardeau and the County Court of Cape Girardeau County; and

WHEREAS as at present advised by publication of a news item in the Southeast Missourian in its issue of November 26th 1940 the Mayor and Commissioners of Cape Girardeau propose to convey to the Federal Government the Common Pleas Court building the Public Library and the major portion of the Courthouse Park for a site for the new Federal Building without consulting the wishes of the County Court of Cape Girardeau County the owner of said Common Pleas Court building and without consulting the inhabitants of Cape Girardeau the owners of Courthouse Park; and

WHEREAS the Supreme Court of the State of Missouri has held that the city officials of the City of Cape Girardeau have no authority to convey the property in question because the title is vested in the inhabitants of the city of Cape Girardeau and not in the city (Missouri Reports Volume 102 page 464); and

WHEREAS the Supreme Court of the State of Missouri in the case of Chouteau against the City of St. Louis, 56 Southwestern Reporter 2d Series page 1052 (relied upon by the city officials of Cape Girardeau as authority to make the deed) pointed out that in that case the conveyance was made in pursuance of a special Act of the Legislature of Missouri which required the grantors to make a conveyance of the fee, the Supreme Court said "The grantors (Chouteau and Lucas) understood the Act to require a conveyance of the fee". The Supreme Court further pointed out that "The conveyance to the Justices of the County Court in trust for the use of the county was a conveyance to the county"; and

WHEREAS the Committee of 100 is pledged to promote harmony and is confident that a vote of the inhabitants, the owners of the real estate, on the city's proposition would end all controversy and thereby avoid any litigation because of a feeling that the inhabitants who own the property had not been given an opportunity to express themselves;

THEREFORE we the undersigned, acting on behalf of the Committee of 100 respectfully ask that the Federal Government require a vote of the people of Cape Girardeau on the city's proposition before accepting the deed to the Common Pleas Court Building, Public Library and the major portion of the Courthouse Park for a new Federal Building site.

(United States Exhibit 14.)

U 3 Ex 14b

C[illegible], [illegible]O.
P. O. [illegible]

That the Committee of 100 pledges itself to do everything possible to promote harmony and to aid the Federal Government to make an early decision in the matter of selecting a suitable site to the end that construction may be commenced on the new Federal Building without delay.

(Signed) I.R. Kelso
Chairman, General Public Committee
on Federal Building Site

(Signed) L.L. Bowman
Secretary, General Public Committee
on Federal Building Site

(Signed) S.[illegible]. Lail
Presiding Judge of Cape Girardeau
County Court

COPY

[fol. 745] Mr. Cooper: Now, Judge Kelso, I hand you a letter bearing your signature, dated March 11, 1941, addressed to Hon. W. E. Reynolds, Commissioner Public Works Agency, Washington, D. C., and ask you if you wrote that letter?

A. Yes, sir.
Q. Now below the signature appears a postscript?
A. Yes, sir.
Q. Did you attach that postscript to it?
A. Yes, sir.

Mr. Cooper: I will have that marked "U. S. Exhibit 15". (The letter is marked as requested). Now we offer and read in evidence "United States Exhibit 15".

Mr. Hall: I desire to object on the part of the defendant Carmack to this letter, for the reason it is not responsive to any matter brought out on direct examination. It is not shown that the witness, when that letter was written, was authorized to represent or did attempt or pretend to represent any portion of the citizens of Cape Girardeau, and because the letter is immaterial to any issues involved in this case, and does not in any way show the right of the Government to condemn the property described in the complaint, and does not in any way show or tend to show that there is no other property available for a post office site, or that the project would fail if the Court House site described in the complaint was not condemned. It is wholly immaterial.

[fol. 746] The Court: Objection overruled at this time.

CAPE GIRARDEAU, MO.
P. O., CT. H. ETC. (NEW)

I. R. KELSO
LAWYER
FIRST NATIONAL BANK BLDG.

CAPE GIRARDEAU, MO. March 11, 1941

US Ex 15
4/19/44
AP

Honorable W.E. Reynolds
Commissioner of Public Buildings
Federal Works Agency
Public Buildings Administration
Washington, D.C.

Administrator	FM-RE-F-FS	CM-S
Commissioner	Legal	P & SC
Mr. Barton	SA	BM
Personnel	SE	Pub. Rel.

TO	INITIAL	DATE IN	DATE OUT	COMMENT
Mr. Doyle				
Mrs Beall				

REF: Cape Girardeau Mo
Postoffice Site New

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does not wish to exercise
property, I would be
ou advise me at your earliest

l regards, I am,

Yours truly,

I. R. Kelso

(United States

NOTED	ACKNOWLEDGED	ANSWERED

Form E-52-A

l regards, I am,

Yours truly,

I. R. Kelso

ments of our Mayor published committee has already been advised of the result of the election. The enclosed newspaper clipping from the Missourian of March 4th may be of interest.

I.R.K.

irk.s

RECEIVED
FEDERAL WORKS AGENCY
PUBLIC BUILDINGS ADMINISTRATION
☆ MAR 13 1941 2

l States Exhibit 15.)

I. R. KELSO
LAWYER
FIRST NATIONAL BANK BLDG.

CAPE GIRARDEAU, MO
P. O., CT. H. ETC. (NEW)

CAPE GIRARDEAU, MO. March 11, 1941

US Ex 15
4/19/44
AP

Honorable W.E. Reynolds
Commissioner of Public Buildings
Federal Works Agency
Public Buildings Administration
Washington, D.C.

My dear Mr. Reynolds:

REF: Cape Girardeau Mo
Postoffice Site New

The writer recently acquired what is known as the Markham property, with the distinct understanding that the government could have the property at actual cost to me, and that I would do nothing to change the option which had been executed by Mr. Markham and is now held by the government.

If your committee does not wish to exercise its option on the Markham property, I would be greatly pleased to have you advise me at your earliest convenience.

With kind personal regards, I am,

Yours truly,

I. R. Kelso

(United S

P.S.- According to statements of our Mayor published in the local paper, your committee has already been advised of the result of the election. The enclosed newspaper clipping from the Missourian of March 4th may be of interest.

I.R.K.

irk.s

RECEIVED
FEDERAL WORKS AGENCY
PUBLIC BUILDINGS ADMINISTRATION
☆ MAR 13 1941 2

States Exhibit 15.)

(United States Exhibit 15.)

Judge Kelso Speaks Out

Gives His Views on Postoffice.

Judge I. R. Kelso aired his views on the proposed trade of a site in Courthouse Park for the present Federal Building in a 45-minute talk last night, during which he paid his respects to those whom he said "run the community" and during which he pleaded for a united people.

Pointing out that he had been criticised and his motives questioned, he declared at the beginning of his speech that property near the present postoffice that he purchased recently could be had by the government, if desired, at the price he paid and under terms of an option given by the previous owner, Edward L. Markham.

Excerpts from his talk follow:

"The leaders of the campaign know that I am not interested in making a dollar out of any site and know that I bought the Markham property with the distinct understanding that the government could have it at actual cost to me and that I would do nothing to change the option which had been executed by Mr. Markham and is now held by the government. This propaganda is intended to divert the attention of the voters from the merits of the Courthouse Park proposition. If I may be permitted to adopt the expression so often used by our distinguished Mayor, this propaganda regarding my interest in any site, is all bunk. I do not believe that the Mayor or any member of the City Council is responsible for the circulation of such malicious propaganda.

"I am strongly of the opinion that the intangible value of a united people is worth more to the city of Cape Girardeau than the selection of a particular site. Because of this conviction I have done everything within my power to bring about harmony in the matter of selecting a site. . . .

new Federal Building at Cape Girardeau. Upon my return from Washington on this occasion, I reported that I was convinced that the Honorable W. E. Reynolds, Chairman of the Joint Committee, was one of the most capable, competent and fair minded public officials that I had ever met. Nothing has occurred since that meeting, to my knowledge, which should cause me to change my opinion regarding Mr. Reynolds. I gleaned from this hearing that Mr. Reynolds had been led to believe that the people of Cape Girardeau were desirous of making the trade.

"The old Postoffice Building on Broadway is a one-purpose building, and would have little value for commercial purposes. In fact, it is not conceivable that anyone would try to convert the old Postoffice Building into space for any commercial purpose. The elevation above the street, as well as the manner in which it is constructed as a one-purpose building, makes such a change prohibitive. Mr. Reynolds appeared to be very familiar with the work which has been done and is being done by Harland Bartholomew throughout the country. Mr. Reynolds stated unhesitatingly that he saw no reason why representatives of his committee should not confer with Mr. Bartholomew. I left the meeting feeling that there was no doubt about the fact that Mr. Reynolds would get in touch with Mr. Bartholomew for the purpose of ascertaining his views with regard to the use of Courthouse Park for a site for the Federal Building. Of course, I have heard nothing further from Mr. Reynolds, but I entertain such a high opinion of his integrity, of his ability and his fairness, that I am willing to state unqualifiedly that I am confident that Mr. Reynolds did communicate with Mr. Bartholomew. I am willing to go a step further and say that I believe that Mr. Reynolds would like to do in this matter what he believes the people of Cape Girardeau would like to have done in the matter of selecting a suitable site. If a site can be selected which will properly serve the government's needs that meets with the approval of the people of Cape Girardeau, I am certain that Mr. Reynolds would approve such a location. Under the circum-

said petition and failed and refused to act upon said petition.

"I want to make my attitude clear with respect to the members of the Main Street group, or the over all civic and commercial group which dominates the city of Cape Girardeau. I believe that I can truthfully say that I have known more or less intimately every member of this over all group for many years. I know that I have always entertained a high regard for the business ability and integrity of every member of the group. I am satisfied that no member of the group would knowingly or intentionally do anything which might be regarded as being injurious to the best interests of the community. However, it is but natural in organizations or groups of this kind, that its members feel that what is best for the interests of the members of the group is for the best interests of the city, and right here is where I doubt the judgment of the members of this group in urging the trade. For example, the manager of a great chain store on Main street, like the manager of any other business, is personally interested in showing a steady increase in volume of sales; a Main street banker is naturally interested in showing a constant increase in bank deposits and dividends; a Main street real estate owner and operator is of course interested in keeping his buildings occupied at good rentals. The members of this group very naturally feel that anything that would tend to improve the prospects for business of all the members of the group would be to the best interests of the city. They forget that their personal interest in the success of a proposition might cause them to take a short-sighted view of the best interests of the community. . . I want to emphasize as strongly as I can that the future of Cape Girardeau rests in the hands of this small group of individuals. I desire also to emphasize the fact that everything said about the power and influence of this group is intended to be complimentary. . . . .

Missourian.

"I think it proper to refer to the attitude of The Missourian in this matter. I think everyone will agree that the platform of The Missourian for 1941 is not only ambitious, but very commend-

cause of this conviction I have done everything within my power to bring about harmony in the matter of selecting a site. . . .

"I am speaking tonight in response to urgent requests of interested citizens who believe it necessary for me to correct the malicious and slanderous charges which are being made again ' me personally in order to infl nce the citizens to vote in favor of the Courthouse Park trade, and because I feel that I owe it as a duty to the people of Cape Girardeau to make the necessary personal sacrifice which I fully realize that I am compelled to make in order to correct the malicious, slanderous and wholly unwarranted statements regarding my selfish interest in any site, and at the same time bring to your attention some important facts regarding the so-called election to be held on March 4. . . .

"Early in August, 1940, I tried to make my position clear to Mr. M. J. Deutsch, Federal Agent, who came to my office for a conference regarding a number of propositions which had been submitted for consideration. I stated to Mr. Deutsch that I was interested only in the selection of a site as soon as possible in order that the government might commence construction of a new Federal Building without delay, and emphasize ' my position, namely, that, in my o pinion, it would be unwise for close personal friends of the late Julien N. Friant to enter into any controversy regarding the merits of any particular site, and that Julien Friant's friends should, without question, agree in advance to favor whatever site the government might select.

"I learned from Mr. Deutsch at this meeting (which was also attended a portion of the time by Postmaster Snider) that the city intended to make an offer to exchange a site in the Courthouse Park for the old Postoffice Building. In response to a question by me as to why an inspector of sites would undertake to go into the details of a trade of the old Postoffice Building for a Courthouse Park site, Mr. Deutsch stated that it was because of the strong endorsements of the trade which had been made by business men. I learned from Postmaster Snider at the time of this conference with Mr. Deutsch, that the statement made in the paper that the present Postoffice Building might be used by the government for offices, came as a great surprise. I briefly reviewed my conversations with the late Julien N. Friant, explaining that, in the opinion of Julien, the Postoffice could be used to an

with the approval of the people of Cape Girardeau, I am certain that Mr. Reynolds would approve such a location. Under the circumstances, I do not believe that Mr. Reynolds had anything to do, either directly or indirectly, with the calling of the so-called election to vote on the Courthouse Park site on March 4th. In making this statement regarding Mr. Reynolds, the Chairman of the Committee, I would not want anything that I have said to be construed as a criticism of any member of his committee. Hon. Walter Myers, the Fourth Assistant Postmaster General, is a new man and is no doubt trying to co-operate with those favoring the Courthouse site because he believes it to be for the best interests of the community. This is but natural. . . .

"It is absolutely necessary for me to mention the names of a number of individuals in order to intelligently state the history of the Postoffice deal. I say this because it shows conclusively that the future of Cape Girardeau rests in the hands of a small group of individuals known in the Postoffice deal as the Main Street Group. This fact is far more important than the selection of a site for a Federal Building.

"What are the facts?

"Washington City looks upon this group as comprising the big men socially, in business and politics in Cape Girardeau. The National Chamber of Commerce of Washington, D. C., regards the members of this group as the business leaders of the city of Cape Girardeau. The Associated Industries of Missouri, a great organization of business interests, also looks to this group for leadership in the city of Cape Girardeau. Every citizen of Cape Girardeau familiar with local conditions, knows that the leaders of this small group naturally dominate the civic, commercial and political organizations of this community. It is no reflection on either the business standing or integrity of any member of the group to say that through its attorneys and other employes it is always on the job. In some communities such groups are called 'rings.' All of you have heard much about 'courthouse rings.' It is known in the present controversy as the Main Street group. I believe that you will agree that the power and far-reaching influence is so great that it may well be designated as a 'streamlined over all machine.' This small group, because of its high standing in the community and throughout the state and nation, is able to make contacts in

matter. I think everyone will agree that the platform of The Missourian for 1941 is not only ambitious, but very commendable. But I am convinced that the approach of The Missourian to a solution of the community problems involved in its platform is all wrong. It is true that The Missourian has appealed to the civic pride of the public to save Courthouse Park, but it has made a mistake in assuming that the people would be given an opportunity to express an opinion regarding the proposed trade at a statutory election. The editors of The Missourian have all along ignored the fact that Cape Girardeau is controlled by this small group of individuals which reflects only the viewpoint of the wealth of this city. If Cape Girardeau should be called upon to deal with a proposition advocated by laboring people under the same circumstances, would not The Missourian view with alarm the selfish activities of a labor union? Is there any difference between the National Chamber of Commerce, the Associated Industries of Missouri, and a well organized, properly officered labor union, except that the Chamber of Commerce and Associated Industries represent the capital invested in business, and labor organizations represent the workers?

"If The Missourian is desirous of rendering a service to the community in the matter of solving the problems involved in its platform it should occasionally have a kind word to say for organized labor as a useful factor in the upbuilding of a community. If it does not intend to do this sort of a thing, then it should cease catering entirely to a small group of individuals, regardless of their high standing and business ability as it has done in this case.

"The Missourian carried a propaganda sheet which was gotten out by those favoring the so-called city's proposition, in the form of an alleged supplement in Thursday's issue of The Missourian. This supplement was gotten out and paid for by those favoring the trade of Courthouse Park, Common Pleas Court and Public Library, for the old Postoffice Building, and was carried free by The Missourian in last Thursday's paper. I call attention to this because of so much shadow boxing by representatives of the Main Street group about The Missourian's unfair attitude towards those favoring the trade. The Missourian not only carried this supplement, but urged the public to give it careful consideration. The Missourian should have at least

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Mr. Deutsch, that the statement made in the paper that the present Postoffice Building might be need by the government for offices, came as a great surprise. I briefly reviewed my conversations with the late Julien N. Friant, explaining that, in the opinion of Julien, the Postoffice could be used to an advantage by the government without in any way competing with any office building; that the demand for space in Cape Girardeau for government agencies could not be supplied. I gleaned from this conference that the proposed trade would be submitted because it had the approval of Harry I. Himmelberger and a delegation of Main Street business men, headed by Messrs. J. B. Carpenter and Clyde D. Harris. That a delegation of Main Street business men headed by Messrs. Carpenter and Clyde D. Harris had appeared before the City Council on July 23rd, 1940, to voice their approval of the efforts being made to trade a building site in Courthouse Park for the Federal Building on Broadway. At the time of the conference with Mr. Deutsch, it was distinctly understood, so far as I could gather, by all interested parties, that there was no intention whatever to interfere with the public library building, that the title to property on which the library is located and other park space would be reserved in any transfer made to the government of any portion of Courthouse Park.

Joint Committee.

"On November 19, 1940, I appeared before the Joint Committee considering selection of site for new Federal Building at Washington, D. C. I learned that this committee had given much time to the consideration of the matter of selecting a suitable site for the [illegible] Main Street group. I believe that you will agree that the power and far-reaching influence is so great that it may well be designated as a 'streamlined over all machine.' This small group, because of its high standing in the community and throughout the state and nation, is able to make contacts in Washington which, of course, cannot be made by the public generally. Honorable Walter Myers, Fourth Assistant Postmaster General, Senator Harry Truman and Congressman Orville Zimmerman, were naturally impressed with the power and influence of this group, otherwise Mr. Myers would never have written a letter stating, in effect, that Cape Girardeau will not get a Federal Building unless the people agree to accept the proposition urged by this group.

"I have never said a word in criticism of the Mayor nor any member of the City Council in discussing this proposed trade. I shall not do so on this occasion. I am strongly of the opinion that the Mayor and Council honestly believe they have adopted the proper course in following the lead of this group of prominent business men. But in my opinion it is most regrettable that the city officials have seen fit to ignore the public in this matter, of ignoring the filing of a petition. The city officials had, in my opinion, a statutory petition filed with the City Council which, if it had been properly acted upon by the City Council, would have made it possible, in my judgment, for an election to have been held on the proposition of exchange of properties in accordance with the laws of Missouri. It is, of course, unfortunate for everybody concerned, that the city officials wholly ignored the rights of the people to file [illegible] paper. I call attention to this because of so much shadow boxing by representatives of the Main Street group about The Missourian's unfair attitude towards those favoring the trade. The Missourian not only carried this supplement, but urged the public to give it careful consideration. The Missourian should have at least published some information in Thursday's paper showing the form of ballot. It should have also told the public about the arbitrary and unfair method adopted by those favoring the trade in the selection of judges and clerks. In other words, I am happy to concede that The Missourian has done much to call attention to the importance of saving the Common Pleas Court, the Public Library and the park, but, in my opinion, it has given 'all the breaks' in the matter of publicity to the group which The Missourian knows dominates all civic, commercial and political organizations in Cape Girardeau.

"I want to again emphasize the fact that I have great respect not only for Harry Himmelberger, Clyde Harris, J. B. Carpenter and Andy Juden, but that I also have a very high regard for every member of the group. I can say that I love the members of this group; that I have long enjoyed and appreciated their friendship; and that I appeal to them tonight as my friends and as citizens of Cape Girardeau to remember the motto: 'That he profits most who serves best.'"

THERMOMETER IS USELESS.

Ordinary thermometers would be melted by the 2600-degree heat used to fuse spectacle glass, so the temperature of the glowing mass is measured by the light it gives off.

States Exhibit 15.)

CAPE GIRARDEAU, MO.
P. O., CT. H. ETC. (NEW)

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[fol. 750] Mr. Cooper: Now we would like leave to withdraw this exhibit and file a photostatic copy of it, Your Honor.

The Court: You may do so.

Mr. Cooper: Now we would like to offer a letter here dated August 19, 1941, addressed to M. J. Deutsch, Federal Agent, Federal Building, St. Louis, Missouri, which was enclosed with Mr. Deutsch's report to the Department, but was not included in the certified copy of Mr. Deutsch's report which was offered in evidence.

Mr. Blanton: Yes, sir; as part of "Defendant's Exhibit B".

The Court: I will read the exhibit if it is already in evidence.

Mr. Cooper: It is part of that exhibit, and as I understand the Court doesn't care to have it read now. I didn't know it was attached. It was not attached to our copy.

The Court: Very well.

Mr. Hall: I would like, if I may, to add to the objection I made to the introduction of these letters from Judge Kelso, that they do not in any way tend to contradict or impeach or discredit the testimony that Judge Kelso has already given on direct examination.

The Court: Overruled.

(Memorandum of the Clerk of the U. S. Court): The letter referred to has heretofore been included in this transcript and same will be found on folio pages 245 to 247 inclusive.

[fol. 751] Mr. Cooper: Now Judge Kelso, the second, as I understand your testimony in chief, the second conference or conversation you had with Mr. Reynolds was at the time you were taking depositions in Washington? Is that right?

A. That is right.

Q. Now at that time Mr. McNearny was present, wasn't he?

A. I think so.

Q. And Mr. Hasson was present, wasn't he?
A. I think so.
Q. They were both there?
A. What other witness, Mr. Betterley wasn't it?
Q. I don't know about that, but Mr. McNearny and Mr. Hasson were both present at the time you were talking to Mr. Reynolds, were they not?
A. I will answer that question and say, Yes, and want to offer this explanation of the whole transaction: In the first place, I began to inquire about getting Mr. Reynold's testimony from Mr. Emmert, Mr. McNearny and Mr. Hasson, and I was told—

Mr. Cooper: Object to what you were told unless you were told by Mr. Reynolds.

A. I was told by Mr. Emmert and Mr. McNearny and Mr. MacLeod.

Mr. Cooper: Object to that, Your Honor.

A. The men you refer to here as being present said that they couldn't get him, and finally the last day, the [fol. 752] deposition will show, they agreed that I might see him.

The Court: The question was, who was present?

Mr. Blanton: It was specifically directed to the two gentlemen who are present now.

Mr. Hall: The question was answered by this witness, and then Mr. Kelso is making an explanation of his answer.

The Court: I do not think that explanation is called for. The question still is, who was present. If we go into all of these ramifications and side issues we will be here a week trying this case.

Mr. Cooper: After you had that conversation with Mr. Reynolds in the presence of Mr. McNearny and Mr. Hasson you didn't take Mr. Reynold's deposition?

A. The deposition states the facts.
Q. You didn't take his deposition, did you?
A. No, sir. Now if it is not out of order I want to say Mr. Reynolds in my opinion is of a very high type, high character executive and competent in every way, and is very candid.

Mr. Blanton: We ask that be stricken. It is wholly unresponsive to anything that was pending before him and is cluttering up the record.

The Court: I suppose a special compliment to any of the administration. I think that is all, Mr. Kelso, unless you have some further question.

Mr. Cooper: That is all.

[fol. 753] Redirect Examination by Mr. Hall:

Q. Mr. Kelso, Counsel for the Government here have offered in evidence several letters. Your attention has been called to the letter dated November 29, 1940, marked "U. S. Exhibit 14", addressed to Hon. W. E. Reynolds. Did you ever receive a reply to that letter?
A. No.
Q. I call your attention to this letter.

The Court: Is that the same gentleman he was complimenting a while ago?

The Witness: That is right, and I doubt now, I will say for the benefit of Mr. Reynolds that that letter was never brought to his attention.

Mr. Cooper: Object to that.

The Witness: All right; the Court provoked that.

The Court: Yes, sir.

Mr. Hall: This letter 1941, marked "U. S. Exhibit 15", did you ever receive a reply to that?

A. No. I notice this letter is addressed to Hon. W. E. Reynolds and the stamp of the receiving end of it shows

"Received Federal Works Agency Public Buildings Administration March 13, 1941." It doesn't show who put it on there.

Mr. Hall: That was not read by Counsel.

The Court: Proceed.

Mr. Hall: That was not read by Counsel for the Government when he read that letter in evidence, was it?

[fol. 754] A. Not that I know of. This is the same letter you were showing me?

Mr. Hall: Yes, sir; that is Exhibit 14, and you referred to this stamp on it. You referred to the stamp on the letter marked "Exhibit 15", which reads, "Received Federal Works Agency Public Buildings Administration March 13, 1941," with stamp designation on it apparently in red ink a figure 2. That was not read by Counsel when he offered the letter in evidence?

A. No, sir.

Q. And there is a rubber stamp endorsement at the top of that letter reading, "Cape Girardeau, Missouri, P. O. CtH (New)". That was not read?

A. No, sir.

Q. Now that is true also, is it not, with respect to this letter to which your attention was called, dated November 29, 1940, marked "Defendant's Exhibit 14"? It has a rubber stamp endorsement near the bottom of it reading: "Received Federal Works Agency Public Buildings Administration, December 2, 1940" and that stamped lettering on it in red ink or red pencil? Is that correct?

A. Yes, sir.

Q. And it also has rubber stamp endorsement at the top, "Cape Girardeau, Mo., P. O. CtH, etc., parenthesis, and end of parenthesis?

A. Correct.

[fol. 755] Q. And it also has on it "Re: Selection Site", and underscoring the word "New" Federal Building at Cape Girardeau, Missouri, "P. O." for post office I presume. That was not referred to by Counsel when he read the letter, was it?

A. No, sir.

Q. Attached to this letter that is marked "U. S. Exhibit 15" a letter of March 11, 1941, there is pasted on to it a piece of paper memorandum which has printed on it, "Administrator F.M. re FFS" and this word "Commissioner", and then the word "legal", and the word "legal" is checked with a red pencil on this. Is that correct?

A. Yes, sir.

Q. And then below that on this memorandum the word "Mr. Martin, S.A. Personnel, S.E." And then there is on it in pen and ink the word "Mr. Doyle" and a line drawn through that, and below that is written what looks like Mrs. Bell?

A. That is right.

Q. And that would indicate that Mrs. Bell got your letter?

Mr. Blanton: Your Honor, it speaks for itself.

The Court: I think you have followed that far enough, Mr. Hall.

Mr. Hall: May I ask this further question?

The Court: Not on that subject. If you have something else material to the case, you may proceed.

[fol. 756] Mr. Hall: I was going to ask if the same memorandum was attached to the letter marked "U. S. Exhibit 14".

The Court: The Court can see what is attached to it. The Court is going to read all the exhibits and see all the markings that is on them.

Mr. Hall: That is all.

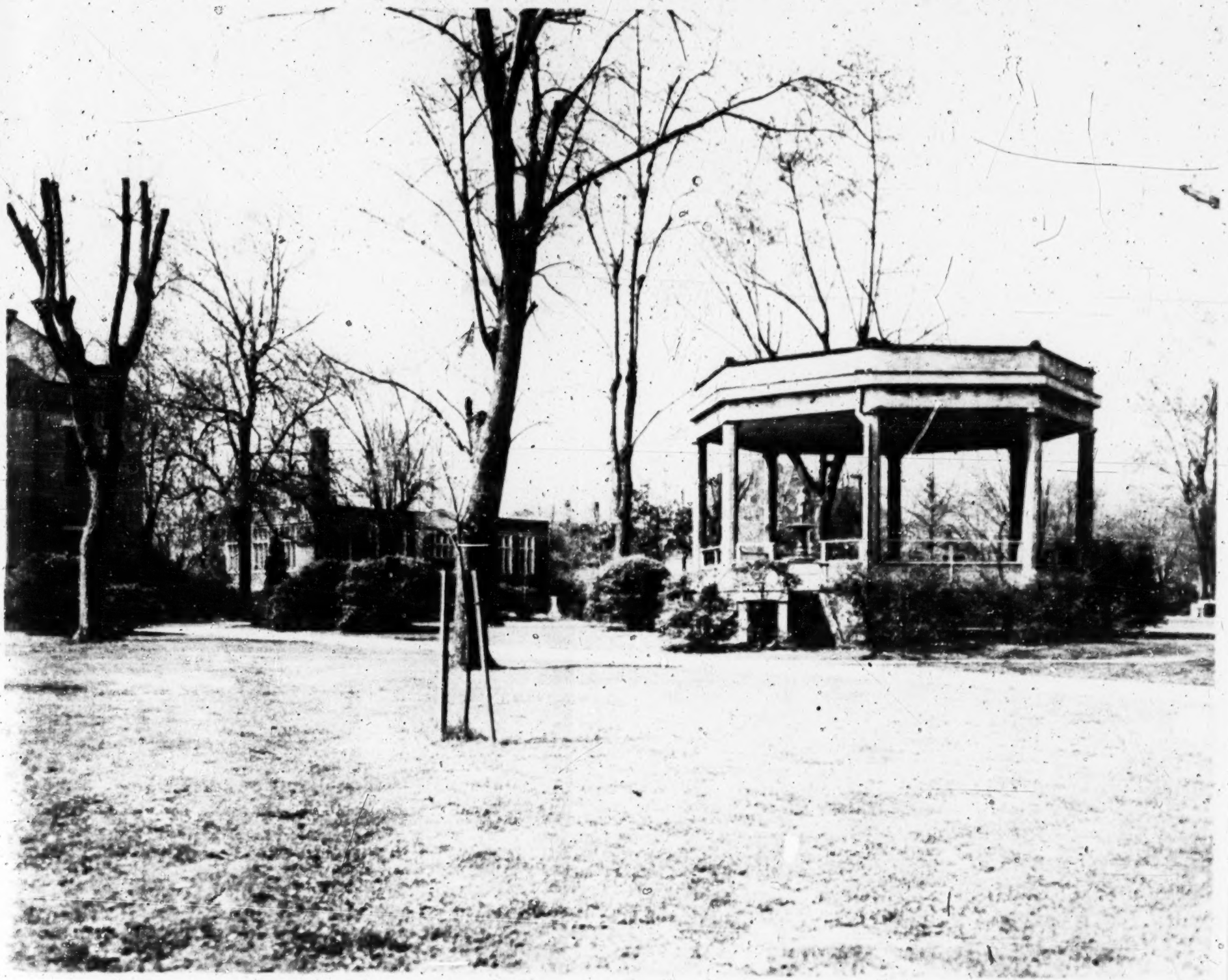
The Court: You are excused, Mr. Kelso.

Mr. Cooper: Now we would like to offer in evidence United States Exhibits 12 and 13, being photographs identified by Witness Kelso:

Mr. Hall: Defendants object to that, Your Honor, because it is not in rebuttal of any testimony offered by the defendant Carmack. The photographs are only partially in there as representative of the Post Office site, the proposed Post Office Site described in the petition, and therefore the photographs are incomplete and do not represent the situation, but only two detached views of it, as was well explained to Counsel by the witness when they were shown to him, and it is not in any sense competent evidence to meet the requirements that are laid down in the opinion of the Circuit Court of Appeals in this case.

The Court: Overruled.

(United States Exhibit 13, -- 4/19/44 AP.)



[fol. 759] Mr. Hall: The defendant Carmack rests, Your Honor.

The Court: Any rebuttal?

Mr. Blanton: Yes, Your Honor, just a little bit.

The Court: Proceed.

Thereupon, the Government to further sustain the issues in its behalf, offered and presented the following evidence in rebuttal:

[fol. 760] Harry G. McNearny of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please.

A. Harry G. McNearny.

Q. Where do you live and what official position if any with the Government do you hold at this time?

A. I live in Washington, D. C. I am Special Assistant General Counsel Federal Works Agency, in charge of land acquisition matters for the agency.

Q. Were you at one time located in Missouri?

A. Yes, sir; I was with the Public Works Administration in St. Louis.

Q. Over what period of time?

A. From June, 1935, to October 31, 1937.

Q. I wish you would state just what division is made in your agency with respect to the handling on the one hand of public buildings, and on the other hand with respect to the construction of public roads.

A. Well, the Agency is composed of constitutent units.

Mr. Hall: If the Court please, may I interpose an objection? That is not in rebuttal to anything that was brought out in the defendant's case, and it is wholly immaterial to any issue now before the Court.

The Court: I presume this is just one part?

[fol. 761] Mr. Blanton: That is correct, Your Honor.

The Court: Objection overruled.

A. The agency is composed of constituent units among which are the Public Buildings Administration headed up by Commissioner W. E. Reynolds, who has charge of the construction of all Federal buildings, such as court houses, custom houses, public health hospitals and similar structures.

Q. How long has Mr. Reynolds been head of that constituent unit of your agency?

A. Since July 1, 1939, and before that he was connected with the Treasury Department in a similar capacity.

Q. I will ask you if the functions which he now handles formerly composed part of the function of the Treasury?

A. Yes, sir, Buildings Branch of the Procurement Department, Treasury Department.

Q. I will ask you if he as Commissioner serves on a committee with the Fourth Assistant Postmaster-General for the selection of building sites upon which there is to be erected post office buildings and custom houses?

A. He does.

Mr. Hall: We did not have an opportunity to make an objection before the answer was given. I would like to have the answer stricken out to make an objection.

The Court: Overruled.

[fol. 762] Q. I will ask you if there is an administrative order that has been promulgated which assigns to Mr. Reynolds the duties and functions of that office?

Mr. Hall: Defendant objects to that question because it is not in rebuttal. It is a mere repetition of what was offered yesterday in the Government's case in chief, in the testimony of Mr. Meyer, and improper.

The Court: Overruled.

A. Yes, sir; Administrative Order No. 1, dated July 1, 1939, signed by the then Administrator of the Federal Works Agency John M. Carmody, authorizing commissioner of Public Buildings Administration to represent him on the inter-departmental committee designated to select post offices and custom houses and court houses.

Mr. Blanton: Your Honor, we have in the mail a certified copy.

Mr. Hall: I desire to move to strike out the answer of the witness because it is not in rebuttal and because he is undertaking to detail the contents of a written paper.

The Court: That part of the answer which attempts to detail the contents of a regulation will be stricken out.

Mr. Blanton: I was just about to state that we have in the mail at this time coming from Washington a certified copy of that order, authenticated copy, and we ask leave to offer that, and of course submit it to opposing counsel as soon as it is received. It is coming here by special air [fol. 763] mail. I think the Court takes judicial notice of orders; but in order that it may be available, we would like to offer that when received.

The Court: Can it be understood it will be submitted to Counsel and they will note their objections and we will rule on the objection when the exhibit is received?

Mr. Blanton: Yes, sir.

Mr. Hall: Of course, we will agree with Your Honor's suggestion upon this condition: That if this paper, that they say is in the mail and was not brought here by any of these four or five gentlemen that came from Washington, should show some of the facts or some information that we would want to rebut or contradict, we would like to have the right.

The Court: You notify the Court and you will be given that opportunity.

By Mr. Blanton:

Q. I will ask you if you were present, Mr. McNearny, in Washington recently at the time when Mr. Kelso appeared to take depositions in behalf of the defendant Iska W. Carmack?

A. Yes, sir, I was.

Q. Did you attend a conference between him and Mr. Reynolds?

A. Yes, sir; I arranged it.

Q. Were you present during the entire conference?

A. I was.

[fol. 764] (Memorandum Of The Clerk Of The U. S. District Court).

The administrative order No. 91 last referred to has been included in this typewritten transcript of record on appeal as part of U. S. Exhibit #17 and will be found on folio pages 804 to 807 inclusive.

[fol. 765] Q. I will ask you if during that conference Mr. Reynolds stated that he as a member of the Committee might have made a mistake in selecting the Court of Common Pleas Public Park site as a post office site in the City of Cape Girardeau?

A. He did not.
Q. Did he say anything of that nature?
A. No, sir.

Mr. Blanton: Take the witness.

The Court: May I ask this witness one question?

By the Court:
Q. Is the Federal Works Agency part of the Treasury Department?
A. No, sir, Your Honor, it is an independent establishment, created pursuant to the reorganization.
Q. No part of the Treasury Department?
A. No, sir.

The Court: Proceed.

By Mr. Blanton:
Q. It formerly was?
A. The present Public Buildings Administration was then a part of the Treasury Department known as the Procurement Branch of the Treasury Department.

The Court: What changed it?
A. The reorganization changed it.

The Court: Do you know the date of the change?
A. It was July 1, 1939.

The Court: Proceed.

[fol. 766] Cross-Examination.

By Mr. Kelso:

Q. Mr. McNearney, you were present at the taking of the depositions?

A. At all but, as I understood, the first session you had with Mr. McLeod and Mr. Emmert.

Q. And Mr. Hasson?

A. Yes, sir.

Q. Is the man in your department there that day named Mr. Emmert?

A. Yes, sir.

Q. What is his position?

A. His position at that time was Special Assistant General Counsel. He has since resigned.

Q. The conference that was held at the taking of the depositions, which was put into the record at that time shows that you entered your appearance in the case as an attorney?

A. Well, it speaks for itself.

Q. You have no recollection whether you did or not?

A. Well, I was there representing the Federal Works Agency in behalf of Mr. Emmert, or in substitution for Mr. Emmert.

Q. You read the transcript and all the proceedings had at Washington relative to the taking of those depositions?

A. I do not believe I read the first day. From the time I participated I read the transcript.

Q. At the time that I was trying to get the parties to [fol. 767] take depositions, Mr. Emmert and others appearing there, Mr. McLeod insisted that I furnish to the attorneys appearing there on the part of the Government a list of all the witnesses that I intended to use in the taking of the depositions?

A. I understand that is so. I do not know about that part of it of my personal knowledge.

Q. Did you have anything to do with the question of the conference or agreement with respect to what witnesses would be subpoenaed and what would not be subpoenaed?

A. I don't believe we ever talked about witnesses being subpoenaed.

Q. Well, being used.

A. Yes, sir.

Q. And when I would be required to give the name of a witness I was informed as to whether that witness would know any thing about the subject matter involved in this litigation?

A. I believe most of that took place during the first session. When I entered the picture I told you right off the bat that from the names of the witnesses that you had in mind I was quite sure that you were not familiar with their duties, since quite a number of them had no connection with the selection of post office and custom-house sites.

Q. Do you recall the statement that you made with respect to the suggestion made that I wanted the testimony or the deposition of Mr. John N. Edy?

A. Yes, sir.

[fol. 768] Q. What was your statement with respect to that?

A. I heard it read today, but that agrees with my recollection. But after I said that I doubted that Mr. Edy had any connection with this transaction, because at that time he was the executive officer of the Federal Works Agency and only occasionally served as Acting Administrator. Mr. McLeod directed my attention to the fact that Mr. Edy had signed a letter to the Attorney-General, and I then mentioned that he was acting as Administrator and executed the documents and mail that was prepared on that day for signature of the Acting Administrator.

Q. And that in signing in that capacity he just signed the documents that passed over his desk without any knowledge of the subject matter of the document?

A. Well, I do not believe it went that far. He would not be thoroughly familiar with the background of any particular matter. He would, of course, read the document or read the letter. If he agreed with it, he would sign it. If he didn't he would not hesitate to call somebody in to get information about it or to refuse to sign it.

Q. I shall not read to you the excerpt from deposition which you stated a while ago you heard read and was in accord with your recollection at this time? Is that correct?

A. Yes, sir.

Mr. Blanton: What page are you reading from?

Mr. Kelso: 87, Mr. McNearny.

[fol. 769] Mr. Kelso: Let's commence back here.

"The exception would be that he—that is referring to John N. Edy—was the Acting Administrator the day that the papers were executed and would have known nothing about it, and the signing of it would have been the only connection that he would have had with it because in the normal conduct of his duties he would not have acted on the matter. He signed the original, that would be the only exception."

[—] Do you recall that statement?

A. Yes, sir.

Q. Is that accurate?

A. That is the way I stated it then. But of course, if that implied more than merely the words indicate there; that is, if he was Acting Administrator, not normally functioning in that position, he would not necessarily know everything about all the transactions that were submitted to him. This was the request for the condemnation and it would merely involve his deciding whether or not it was proper to sign the request for condemnation. It didn't deal with the selection of the site or suitability, or anything like that.

Q. He didn't participate in anything of that kind?

A. No, sir.

Q. Now you were present when Mr. Emmert made the statement referred to?

A. No, sir; I was not present when Mr. Emmert was there.

[fol. 770] Q. You know that General Fleming, that it was agreed that General Fleming did not sit in on any conference and was not present at any conference?

A. It was agreed and the stipulation so reads, that General Fleming had no independent knowledge of this transaction; that is, nothing outside of the official records of the Federal Works Agency. It meant that he didn't know like he came down here to see the site and satisfied himself from looking at it.

Q. You were not present when the statement was made that Colonel Fleming knew nothing about it and didn't sit in any of the conferences?

A. No statement of that kind was ever made while I was present.

Q. That was Witman. Do you know whether it is a fact, except as you state, as to Colonel Fleming's connection with it?

A. I agreed to that stipulation. In fact, I signed it.

Q. When we were taking the depositions, were you present at any of the preliminary conferences of the attorneys?

A. Yes, sir; I think I was present at all except the first one.

Q. I am not talking about the conference after the stenographer was present. I mean did you appear when Mr. McLeod and Mr. Hasson and some 8 or 10 lawyers held a conference in the office of the Commission Section?

A. No, sir.

[fol. 771] Q. Were you present when Mr. McLeod stated at the outset that the first thing the Government wanted to know before consenting to taking any depositions, was who was paying my fees and expenses? A. No, sir.

Q. That was before you entered? A. Yes, sir.

Q. Now in the conversation that we had over at—

Mr. Blanton: We think the last remark is out of order assuming there was any such statement made, and ask that it be stricken from the record.

The Court: Sustained.

Mr. Kelso: Now I want to go along as coolly and as calmly as I can to avoid the confusion of the Court, to get the facts before it.

Q. According to your knowledge, I tried from November 1st up until November 9th to get an interview with Mr. Reynolds?

Mr. Blanton: Object to that as being argumemntative and assuming.

Mr. Kelso: I am asking him if that is not a fact.

Mr. Blanton: How does he know what Mr. Kelso tried to do?

Q. You were arranging fo the appearance of the witnesses?

A. I arranged the conference t at was held with Commissioner Reynolds.

Q. Do you know on the first day of the taking of the depositions I listed as the first man I wanted to take [fol. 772] was Mr. Reynolds?

A. I was not present the first day, but I believe that to be a fact.

Q. And I repeated that request a number of times between November 1st and November 9th?

A. Well, I know you made mention of it at the first session I sat in on. And at that session after considerable discussion, it was agreed that the Government would furnish you with the statement of facts outlining chronologically the developments insofar as the Government's position was concerned, with respect to the selection of this site. And upon your receiving that you would then let us know what witnesses you would want to inquire of, and if possible some general indication of the nature of the testimony you expected to elicit from them.

Q. That statement of fact, chronological statement of fact, was to include all of the files in reference to all the files and records and proceedings had in relation to this matter, which was to be furnished by Mr. Witman?

A. The statement was to be based on all the information and data in the Agency's file.

Q. Now then, later on when the Counsel, all of you, reported back the result of that, they didn't give to me a statement of the facts—

Mr. Blanton: I don't want to cut off proper cross-examination, but I don't know just what he is driving at.

[fol. 773] The Court: What is your purpose?

Mr. Kelso: I want to show by this witness that they came back to me with a chronological index and said to me, "We will let you use this chronological index upon the condition that you never permit it to be used or show it to anybody, and it is for your own personal use." I said, "I have been a long time trying to get it and I will accept it under those conditions." And I then took that chronological index and have kept faith with the gentlemen and took it out of the file to use it in preparing the agreed statement of facts and checked each and every item referred to. Now then, after that this witness as indicated undertook to work out an agreed statement of facts which

took sometime, but we tried to include, or did, every item in that chronological index. And this witness knows and I think will testify, because he was a party to the preparation of it and supervised the comparison of the facts or the statements in there with the facts as they existed. And I will say that the agreed statement of facts was made from this chronological index as best we could, and that it was the intention of the parties to embrace, so far as we could discover at that time, to embrace all the matters referred to in the chronological index which the witness has just described.

Mr. Blanton: Your Honor, that stipulation of facts was executed and was read in the record here a couple of days ago.

The Court: Is it your purpose to show that the stipula-[fol. 774] tion of facts are agreed statement of facts contains all of the evidence of the Post Office Department or the Department of Federal Public Works? Is that what you are driving at?

Mr. Kelso: That is right, and I did that with Mr. Meyer, and I have done that everywhere, and the witness has already stated that was the purpose of it. And I am going to add—

The Court: I do not understand anybody in this case is challenging or attempting to impeach that agreed statement of facts.

Mr. Kelso: But they come in here today on the trial of the case in this Court and undertake to offer in evidence the files in the form of letters which they undertake to say are important documents in this case, which were not included in that chronological index that I had.

The Court: Is that the purpose, are you trying to show they didn't show you those letters?

Mr. Kelso: That is right.

The Court: You mean the letters you had written?

Mr. Kelso: Yes, sir.

The Court: All right, objection sustained. Certainly you were not misled by failure to show you that that you yourself had written.

Mr. Kelso: I am trying to show that as far as I know it covered the things that Mr. Meyer and these folks wants. And I went to see whether it did, and I understood that he said it was intended to cover and so far as he knows did [fol. 775] cover everything in the files pertaining to this case.

By Mr. Kelso:

Q. Now what time did we finally agree to visit Mr. Reynold's office?

A. I believe it was in the afternoon.

Q. Of what date?

A. I do not have the date in mind.

Q. It was the last day on November 9th?

A. I think it was just prior to the time we signed those papers. We went back to my office for them as I recall and sat around signing the stipulation, with the exception of Mr. Hasson. I think he took his copy to the Department of Justice and signed it later.

The Court: Mr. Kelso, if you want to ask this witness the question if the agreed statement of facts or the stipulation covers all the facts that the department had in their files on this subject, I will permit you to do that.

Mr. Kelso: That is what I have asked him.

The Court: Very well, answer that question.

The Witness: I didn't hear that question.

The Court: You can ask it in your own language.

The Witness: I can answer it from the way you stated it. It is my understanding that the chronological statement given to Judge Kelso contained all of the important items pertaining to the final selection of the new Custom House and Court House and Post Office site in Cape Girardeau; but the stipulation was prepared in first form [fol. 776] by Judge Kelso and agreed to by Mr. Hasson representing the Department of Justice, and myself, based on what he had presented to us as embodying points he was to bring out, as were related in the chronological statement.

The Court: Were there material matters before the Department on which they based a decision, that are not in that agreed statement of facts or stipulation?

A. Not to my knowledge.

The Court: Is it your knowledge from an examination of the files in the department with which you are connected that this stipulation that you entered into covers material facts upon which the Department based its decision? A. That is right.

Mr. Kelso: Now then with reference to this statement that you made as to what transpired in the office of Mr. Reynolds, as to what was said: Now you say you arranged that conference?

A. This was a request; yes, sir.

Q. We adjourned the meeting and hearing of the deposition to go to his office? Is that right?

A. Yes, sir.

Q. And when we reached the office, what transpired in the outer office?

A. Well, I believe we were met by Miss Moss, and there was some gentleman unknown to me who was seated over where the second secretary usually sits. And Miss [fol. 777] Moss told us Mr. Reynolds was waiting.

Q. Then what did you tell me?

A. What did I tell you then?

Q. Yes, sir.

A. Nothing particularly.

Q. Didn't you tell me that it would be necessary for me to wait in the outer office until the three men had the conference with Mr. Reynolds?

A. Not that I recall.

Q. Don't you know that the three men did in fact go in and leave me in the outer office and hold a conference before I was invited into the meeting?

A. What three men?

Q. You and Mr. Hasson and Mr. Beterly.

A. Well, it had been my recollection that we went right in, but I believe what you say is so.

Q. Do you recall what I said to Mr. Reynolds when I went in?

A. Yes, sir; after exchanging pleasantries, you said you wanted to find out—

Q. I want it before that. Did I tell him then what I thought in regard to the attitude of the Department guarding him against my meeting?

Mr. Blanton: We do not think it is competent, what statement he made about his attitude towards the Department.

The Court: I presume he is leading up to the state-
[fol. 778] ment the witness testified to.

Mr. Kelso: Didn't I say, "Mr. Reynolds, you are more closely guarded than the White House with all its palace guards;" that "I have been trying to see you from November 1st to November 9th and have never been able to get into your presence?" And he said, "Trying to see me?" You don't recall that?

A. I don't recall that, no, sir; but I wouldn't say absolutely certain that there might not have been an exchange like that, because as I said, you greeted one another, and something like that would not stand out in my memory.

Mr. Blanton: Please take your hand down. We can't hear half you say with your hand in front of your mouth.

Q. Following that which you say might have happened, then what statement was made? And by whom?

A. You told Commissioner Reynolds that you were interested in finding out what regulations might have been promulgated with respect to advising site-inspection men when they were sent out to select a building such as we had under consideration. This new building in Cape Girardeau. And Mr. Reynolds said they had no form or no regulations that were given to the site men, that he and I believe Mr. Meyer a few years ago, or it might have been his predecessor. That he and the Fourth Assistant Postmaster had given careful consideration to the adoption of regulations, but after going into the matter they realized that the situations varied so much between one local-
[fol. 779] ity and another that they had given that up, that idea up. And Mr. Reynolds said that to his knowledge there was not any form. And Mr. Beterly said he believed

the Pos Office Department had a form which was more or less technical in nature, which was filled in by the site man, indicating the location of utilities and getting data as to the estimated number of lock boxes that would be in the new post office, and the volume of mail, and similar technical data. And following that you said you would be interested in obtaining the Deutsch report, that you didn't want to bother the Commissioner, that he was a very busy man. If that report could be made available to you, you would be satisfied. And the Commissioner sort of indicated or inquired whether there would be any objection. And I believe I stated that it did contain information as to estimates as to the values of various properties and for that reason he might not want to make it available. And he said, "Well, those estimates were made sometime back," and if that was the only point he would have no objection. And we indicated that the report would be made available to you. And you expressed to the Commissioner your deep appreciation of him, and so forth and so on, and we adjourned.

Q. Do you recall any statement made by the Commissioner, Reynolds, that in the past they had been wrong sometimes? "Bad wrong" are the words he used, in the matter of selecting sites?

A. No, sir. In fact, I don't believe the conversation [fol. 780] dwelt on whether the selection of this site was good or bad. I don't believe we touched that point.

Q. Do you recall any reference whatever made by Commissioner Reynolds with respect to the men on the hill? A. No.

Q. You have stated everything that you remember that transpired?

A. That is right.

Q. And you have come here to say that any statement of my recollection of it is incorrect?

A. No; I am merely here to state that what you told earlier on the stand as having been a statement made by Commissioner Reynolds was not spoken at that conference.

Q. And you stated everything that transpired to your recollection?

A. That is right.

Q. How long, if you remember, were we in conversation with Mr. Reynolds?

A. I don't think over ten minutes.

Q. How long were you in there before I went in?

A. I wouldn't say over three or four minutes.

Q. What did you [discusss] with Mr. Reynolds before I went in?

Mr. Cooper: I don't think that is material, what he discussed before he went in there.

[fol. 781] Mr. Kelso: He was making my appointment.

The Court: I don't think that is material. What is the purpose of that?

Mr. Kelso: There are two things: He is here and states that my recollection of everything that transpired is accurate and correct except one statement that he says that is not true. Now I think maybe the witness may have confused his conversation before I went in with what transpired after I went in.

The Court: Go ahead and ask the question.

Mr. Kelso: Well, that is the question.

(Last preceding question is read).

A. My recollection is that we merely told Mr. Reynolds that you were in Washington for the purpose of taking depositions respecting the selection of the new Post Office, Custom House and Court House site in Cape Girardeau. That you had said that if you could talk to him for a few minutes, you might not want to take his deposition. I think that is the substance of it.

Q. Now there were three of you in there. I am going to ask you these statements: Is is true that any executive or officer acting in the capacity of Mr. Reynolds, or in a similar capacity, is never permitted to hold an interview except in the presence of three of his staff?

Mr. Blanton: Your Honor, object to that as being immaterial, and sheds no light on the controversy here.

The Court: Sustained.

[fol. 782] Mr. Kelso: The purpose in offering that is that that was so common that it was agreed that was the practice, and not only that department but all of them, and I thought it was proper to put it in here, because I think it is competent for that purpose.

Mr. Kelso: Mr. McNearny, that is all at the present.

BERNARD J. HASSON of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination By Mr. Blanton.

Q. State your name, address and employment at this time please.

A. Bernard J. Hasson, Attorney Lands Division Department of Justice, Washington.

Q. How long have you been employed by the Lands Department of the Department of Justice?

A. Eighteen years.

Q. As part of the duties assigned to you, have you been assigned supervision of the condemnation case which is on trial here? A. Yes, sir.

Q. As well as other condemnation matters pending in Missouri?

A. That is right.

[fol. 783] Q. I will ask you if you were present at the taking of certain depositions in Washington when Judge Kelso went there a few months ago to take depositions?

A. I was present at all.

Q. You are the Mr. Hasson referred to in those depositions? A. Yes, sir.

Q. Did you attend the conference which Mr. Kelso attended with Mr. Reynolds?

A. I did.

Q. About which Mr. McNearny has just testified?

A. Yes, sir.

Q. I will ask you to state to the Court if you heard the testimony of Mr. McNearny here?

A. Yes, sir.

Q. Were you one of those who attended the conference?

A. I was present the whole time.
Q. Who else was present?
A. Mr. Betterley and Mr. McNearny.
Q. Mr. Kelso and the Commissioner?
A. Yes, sir.
Q. I will ask you to state to the Court if you heard Mr. Reynolds state to Mr. Kelso on that occasion that the Committee consisting of himself and Mr. Meyers might have made a mistake in the selection of the Post Office [fol. 784] site here in Cape Girardeau?
A. No, sir; I did not.
Q. Did you hear him say anything of that nature?
A. He never intimated any such thing.

Mr. Blanton: Take the witness.

Cross-Examination.

By Mr. Kelso:
Q. You have been in the court-room and listened to the testimony of Mr. McNearny, have you?
A. Yes, sir.
Q. Is the statement that he made substantially the recollection that you have of the facts?
A. About what transpired, it is substantially correct.
Q. You are the man that I met in Washington on or about October 28th or 29th, is that right?
A. The first day you came in the department I met you, yes, sir.
Q. My appointment was with a man Yost, is that right?
A. I don't know.
Q. How did you happen to be called in?
A. The Cape Girardeau Post Office case is assigned to me.
Q. Who called you in?
A. I think it was either Mr. MacLeod or Mr. Yost.
Q. Where did you meet?
A. With whom?
Q. At the time at Mr. MacLeod's office?
A. At Mr. MacLeod's office.
[fol. 785] Q. Now when we undertook to agree on the time for taking depositions in Mr. MacLeod's office on October 29th, you gentlemen said that I was there representing a client that had no right to defend in this case?
A. Are you asking me?

Q. Yes, sir.

A. I do not recall that.

Q. You told me that you had a telegram from the U. S. Attorneys of the Eastern District of Missouri instructing you by telegram to oppose the taking of the depositions?

A. No, sir; that is not correct.

Mr. Blanton: Your Honor, I think I want to object to that because Judge Kelso knows as a fact that he came to my office and I agreed to waive the notice to permit him to take these depositions in Washington.

The Court: The witness has answered.

By Mr. Kelso:

Q. Did you not tell me the next morning on my suggestion that you were to have a letter if you would look for it, from Mr. Blanton, in contradicting that statement, and you showed me a letter written October 20th from Mr. Blanton and received by the Department on October 22nd, and it enclosed the stipulation to take depositions, and you stated that that was the first time that it had been called to the attention of either yourself or Mr. MacLeod?

A. We received a letter in the Department?

[fol. 786] Q. I am talking about didn't you tell me that? Didn't you show me the letter?

A. I don't recall the letter.

Q. And you have no recollection whatever of your statement to me in the presence of Mr. MacLeod that you had instructions, before I insisted on that letter, to oppose taking that deposition?

A. Instructions from Mr. Blanton?

Q. Yes, sir.

A. We issue instructions to Mr. Blanton, we don't receive them from Mr. Blanton.

Q. You didn't answer my question.

A. Well, evidently Mr. Blanton has no authority to issue instructions to the Department of Justice.

Q. That is right. Didn't you say that "We must depend upon Mr. Blanton to try this case and we will try to carry out his wishes?"

A. I said that, yes, sir.

Q. Now then, do you recall that Mr. MacLeod said to me, walked around his table in front of you and in front of me

and said, "The Department of Justice wants to know before they will consent to anything in this case, who is paying your fee and expenses"?

A. I do not think it was made a condition precedent, Judge. I think he did it jokingly, asked you who was [fol. 787] paying your fee.

Q. Do you remember that he did say that?

A. I say he asked you who was paying your fee.

Q. Didn't he say the department wanted to know who was doing that? A. No.

Q. And didn't they later undertake to do what you are doing now, a day or two afterwards, soften the blow by saying "It might be misunderstood?"

Mr. Blanton: I don't know what this is leading to or where we are getting, but I think we are killing a lot of time.

The Court: I think so, too. Mr. Kelso, I will permit you to go into any matter that this witness has testified to—

Mr. Kelso: When the witness comes in to impeach me, I think I have a right to search him from top to bottom. And when he sat in the room and told you or let the other fellow tell you and he corroborated it, that they had such instructions and wanted to corroborate, I said "You are dead wrong". I want to show, because if they are wrong in that as they are, then it might be that there might be a possible chance that they might be mistaken about some other thing that happened.

The Court: I think this whole matter is being made out of a mole hill, and the fact he may or may not have said [fol. 788] that he has made a mistake—he didn't say it—I anticipate he would have said it if you had asked him, because it would be very unusual if sometime in his life he hadn't made a mistake.

Mr. Kelso: I have no further questions to ask.

Mr. Blanton: That is all, Mr. Hasson.

Mr. Blanton: Your Honor, we now would like to offer and have identified as "U. S. Exhibit 16" a certified copy of this Tucker report, the associate architect, dated October 19, 1941, which has been identified as "U. S. Exhibit 16", which I now show opposing Counsel.

Mr. Hall: If the Court please, this exhibit consists of four and a half single space typewritten photostatic pages, together with a photostatic print attached to it covering at least as much as two pages. We have not had opportunity to examine it. I think I am justified at this time in this stage of this proceeding to make the objection that this is not in rebuttal and that it is out of order and that it does not in any way become material about any evidence offered on behalf of the defendant in this case, as well as adopting the objections that were heretofore made yesterday to the introduction of other exhibits on behalf of the Government.

The Court: The objection will be overruled at this time.

[fol. 789] Mr. Blanton: I will not burden Your Honor with the reading of this, but we want to make the formal offer, unless Your Honor prefers that we read it.

The Court: I am overruling the objection.

Mr. Blanton: I am going to offer it and consider it in evidence.

The Court: Yes, sir.

Mr. Hall: Your Honor, we would like to read it.

The Court: Have you got a copy of it?

Mr. Blanton: We might have an uncertified copy, if we have we will be happy to supply a copy to Counsel.

The Court: If not, Counsel can borrow that copy later.

Mr. Blanton: We will be glad to furnish him a copy, or he might make a copy of it himself.

Mr. Hall: That is certified July 8, 1943. This is the first time we have ever seen it.

Mr. Blanton: We have a copy here.

Mr. Hall: I don't know what further objections we might wish to make to it.

The Court: They are going to furnish you a copy. If you have any further objections, notify the Court what they are.

Mr. Blanton: I now hand opposing Counsel photostatic copy of Government's Exhibit 16, the only difference being

that it does not have the certificate of the custodian of that [fol. 789a] document attached to the photostatic copy which I have handed Major Hall at this moment.

The Court: Proceed to read it and make your objections.

[fol. 790] (United States Exhibit 16 — 4/19/44 A.P.)

Federal Works Agency
Washington

Office of the Administrator

I hereby certify that the annexed paper (six sheets) is a true photostatic copy of report of H. Arthur Tucker, Associate Architect, Public Buildings Administration, Federal Works Agency, dated October 9, 1940, on proposed selection of a site for a Post Office and Court House at Cape Girardeau, Missouri, the original of which is on file in the Federal Works Agency.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on this 8th day of July, 1943.

Seal
Federal Works Agency
United States of America.

By direction of the
Federal Works Administrator:

ALAN JOHNSTONE,
General Counsel,
Federal Works Agency.

[fol. 791]

Cape Girardeau, Missouri
United States Post Office and
Court House.

Federal Works Agency
Public Buildings Administration
Washington

Office of the Supervising Architect — October 9, 1940

In Replying, Quote the Above Subject, Building, and These Letters SA—

Mr. Louis A. Simon,
Supervising Architect,
Public Buildings Administration,
Federal Works Agency,
Washington, D. C.

Sir:

Pursuant to instructions in Division letter dated September 27, 1940 and amended by telegram October 2, 1940, I proceeded to Cape Girardeau, Missouri, and St. Louis, Missouri, for the purpose of investigating conditions on and around the so-called Court House site which has been offered in exchange for the present owned Federal property, for use as a site for the proposed Post Office and Court House building.

My report is as follows, supplemented by notes and drawings:

Cape Girardeau, Missouri

With Postmaster Nat Snider, visited the Court House park site. There I discussed with City Attorney and Acting Mayor Robert Oliver, Commissioner R. E. Beckman, City Engineer J. R. Walter and the Postmaster, the possible locations on the Court House Park site to locate the building.

The city officials produced a plan for a future civic center development which had been previously prepared by Harland Bartholomew and Associates, City planners, etc., of St. Louis, Missouri. This plan established the location of the present Court House as the focal point (see copy obtained) from which an axis is drawn westward through center of proposed widened Themis Street. All future new civic buildings are to flank this axis creating a mall. The above-mentioned city officials favored any scheme developed by the Government in locating the new Post Office and Court House which would be in accordance with and so which would expedite the commencement of proposed Civic Center. Because the proposed new Federal building without doubt, will be the largest and most imposing building to be built in this Civic Center, it seems obvious that it should be the building erected on the most prominent site of the plan. With the present city-owned park site therefor established as the most prominent feature or focus of the Civic Center, it leaves only the exact location of a building on that site to be determined.

[fol. 792] Examination of the developed plan and the topography predetermines the building be located to center on Themis Street and as far back from Lorimer Street as is permitted by the terraces at the east or rear of the site. This proposed location is also the location of present old

Court House and City Hall. If said building be located there, it is imperative that it be so designed to have a center axis motif on both east and west fronts of the building.

The topography of the land is generally flat on the area proposed to locate the new Federal building. South of the building, where the Post Office driveway has been tentatively suggested, the ground slopes off sharply in a series of terraces. From my observations, it appears quite feasible to extend the flat area, using excavated material and thereby moving the contour lines of the existing terraces further south from the building. This suggestion would place the driveway on new fill but would avoid the use of a retaining wall.

This park site is located on a promontory which gives it a commanding position, jutting out toward and rising high above the Mississippi River, two blocks distance. The present Court House on the site appears from the railroad station, from the Mississippi River, from the river bridge and from across the river in Illinois, to be the most domineering building in Cape Girardeau, with the exception of the Academic Hall of the Teachers College located more than a mile to the west rear on a hill.

No sentiment ought to be attached to removal of present old Court House for its design lacks quality, its condition of repair dangerous. It has been so devoured by termites the floors are propped up by struts and timber braces, to prevent them falling through at possible cost of life.

A small red brick Public Library is also located on the City Park, to one side of the established axis and partially in front of the proposed Government building site. From information obtained from the city officials and from the Chairman of the Library Board, Judge James A. Kinder, the Library is outgrown and very inadequate and will have to be replaced in the near future by a new building which would be located on the proposed new mall, thereby forming the second unit of the Civic Center. Consequently, I feel that the presence of the library adjacent to the New Federal building would be only a temporary condition and therefore its embarrassing position partially in front of the new building should be diregarded, with a far-sighted eye to the future as the real guide.

To erect the Federal building on the Park site requires obtaining sufficient ground for the needs of the Government. The city officials of Cape Girardeau have offered to exchange the amount of land needed by the Government in [fol. 793] the park, on an even basis, for the present Government-owned Post Office and Court House site and building, provided the north end of the park is not required by the Government and can be retained for public park purposes by the city. The city officials do not propose to predetermine the exact physical limits or restrictions of either the amount of land needed by the Government nor the north part which they require be left as a public park.

City Attorney Oliver, in conversation with me, said he wasn't sure who is to make the next move. He suggested that the Government decide the exact amount of land they would need and submit the request in the form of a drawing to the city officials, keeping in mind not to require or request any more on the north side of the building than they feel they actually need. I believe any drawing prepared by the Government for this purpose should show the entire park so that the proposed Government land can be properly shown in relation to that to be retained by the city for park purposes. I asked the City Attorney whether he thought the city could deed the land occupied by the library to the Government with the Government granting the city by revocable license, the use of that land so long as it is used by the library. He replied in the affirmative. I explained to him that I asked that question because I felt that the Government would prefer to obtain a nearly rectangular piece of ground rather than a piece of ground in the center of a park with only easement rights to it.

The legal right of the city officials to deed any part of the park to the Government to use, is questioned by some people in Cape Girardeau. In fact, the people are divided on one point, simply, to use a part of the city-owned park for the new Federal building or to retain it completely as a park, erecting the Federal building elsewhere.

Previous to my arrival, the local newspaper announced that a Government architect would be in Cape Girardeau to make a survey of conditions relative to the new building. The Chamber of Commerce, the West Broadway Business Men's Group, the newspaper as well as numerous

influential individuals made plans and called special meetings for me to attend in order that they could present their views regarding the location of the building. The Postmaster accompanied me at all of the meetings and interviews, at which I took notes to record the views of the various groups and individuals and which I have filed as a supplement to this report.

Various individuals and groups asked me to state why I was in Cape Girardeau and what I might be able to accomplish. My unvaried reply was that I was there to study the park site and its environs so that if it is finally decided to place the Government building there, it can be done to the best mutual advantage of both the city and the Gov- [fol. 794] ernment. Also I stated that the Government is trying to gather data and obtain further information which will help them make a final selection of a suitable site with a minimum loss of time and that the Government is considering favorably making the proposed trade with the city for the economic and architectural advantage that will be gained thereby, to the mutual advantage of all concerned. I also stated that I thought a building could be designed which would accomplish its purpose as a building terminating an axis or mall and which would also allow a good portion of the north end of the city park to be retained. My carefully guarded statements were somewhat distorted by the local press which said I was there to study and consider only two alternatives, first, the proposed trade and second, the purchase of additional land adjoining the present Post Office, the demolition of present Post Office and the erection of a new building on the present and enlarged Post Office site. That distorted newspaper report of my activities and reason for being in Cape Girardeau brought to light one important fact; not one person whom I met, regardless of whether they were for or against using the Court House park site for the Federal building, would think of tearing down the present Post Office and every person wants to use it for a City Hall and Common Pleas Court House, whether it is traded to or purchased by the city. On that point all agree; whereas to tear down the present Post Office is there considered a ruthless destruction of valuable property.

If the city officials can legally trade their publicly-owned Court House park site for the present Post Office building

and land, I recommend it be accepted, and if that be not legally possible, I then recommend the Post Office be sold to the city and land purchased in some other location for the New Federal building.

Authority was given me by wire in Cape Girardeau to visit the office of Harland Bartholomew & Associates in St. Louis for consultation regarding the Civic Center Plan for Cape Girardeau. Consulting with Mr. R. H. Riley of above-mentioned firm, I learned that in their written report, which is an integral part of their study for the Civic Center, they have said that the focal point or park site should be reserved for the largest building which probably would be a Federal building. Copy or partial copy of said report may be obtained from city officials of Cape Girardeau, and a photostatic copy of the Civic Center Plan is filed as a supplement to this report.

I also consulted Judge George Moore of the St. Louis Federal District Courts and Presiding Judge of the Cape Girardeau District. From him I obtained technical planning data which can be incorporated in the plans for the new building. This data is also filed as a supplement to this report.

[fol. 795] A drawing showing proposed location of new Federal building on Court House site in accordance with all factors and data obtained has been prepared and on file in architectural section.

List of supplements to report:

"A" Recorded notes on comments and opinions of groups and individuals in Cape Girardeau.

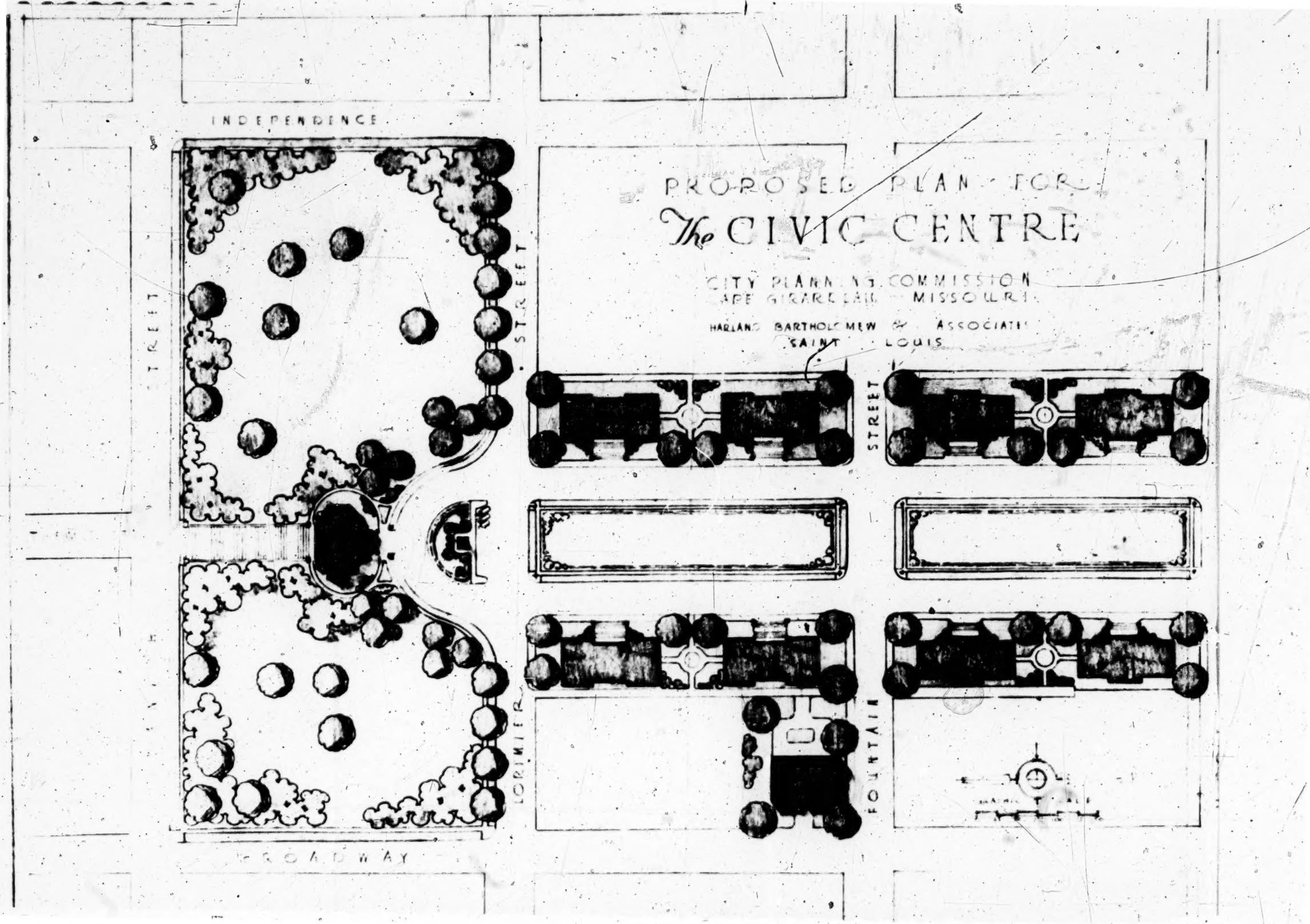
"B" Civic Center plan of Cape Girardeau, obtained from office of Harland Bartholomew and Associates, St. Louis.

"C" Drawing, showing proposed building location, etc.

"D" Technical court room planning data on file in Architectural section.

Respectfully submitted,

H. ARTHUR TUCKER,
Associate Architect.


PROPOSED PLAN FOR
The CIVIC CENTRE
CITY PLANNING COMMISSION
CAPE GIRARDEAU MISSOURI
HARLAND BARTHOLOMEW & ASSOCIATES
SAINT LOUIS
INDEPENDENCE
STREET
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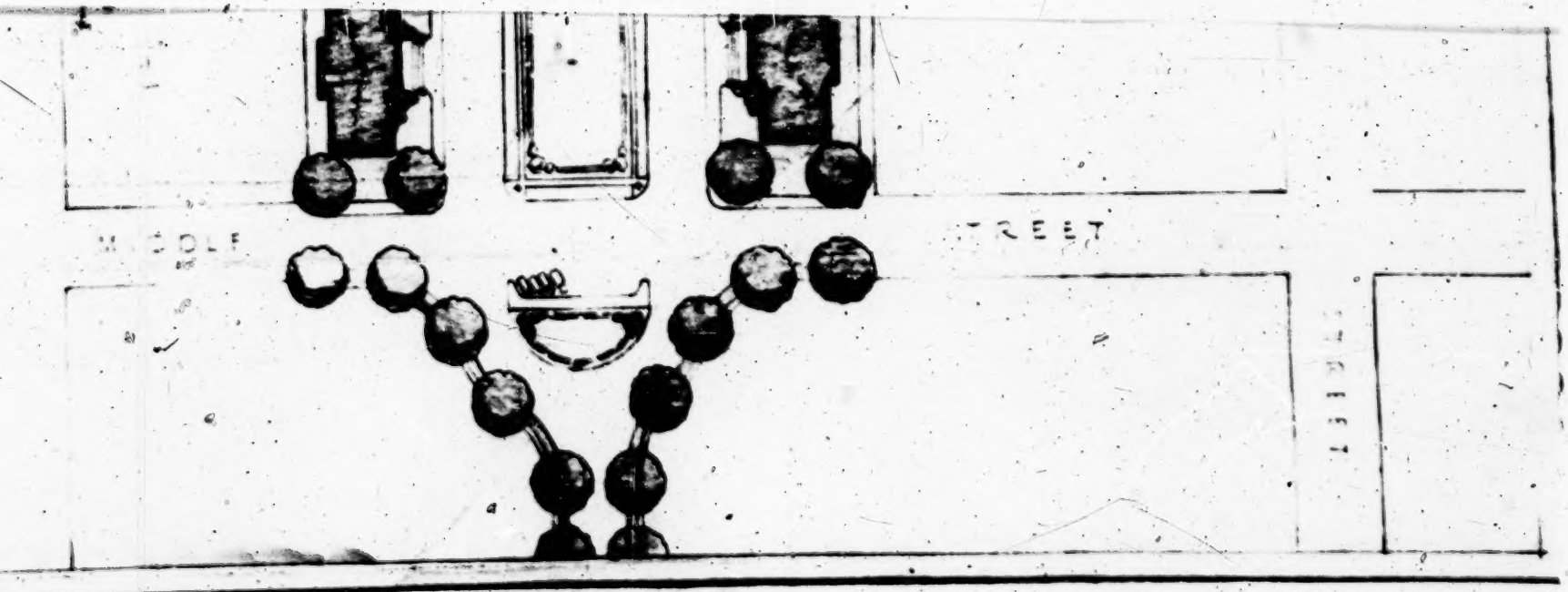
LORIMIER
FOUNTAIN
BROADWAY


STREET

[fol. 797] The Court: Have you anything further, Mr. Blanton?

Mr. Blanton: No, sir; that concludes our evidence.

The Court: Any further evidence on the part of the defendants?

Mr. Hall: No, Your Honor.

The Court: Does the Government desire to submit suggested findings of fact or request for conclusions of law?

Mr. Blanton: We would be very glad to, Your Honor.

The Court: How much time do you want? Five days?

Mr. Blanton: I think that will be sufficient, Your Honor.

The Court: Government given five days to file request for findings of fact and conclusions of law. And the defendant desires the same time?

Mr. Hall: Yes, sir.

The Court: Defendant granted five days to file request for findings of fact and conclusions of law.

Do you gentlemen want to be heard?

Mr. Blanton: No, sir, I do not think so.

Mr. Kelso: I want to let the record show the offering of demurrer that I handed you at the close of the case.

The Court: Yes, sir.

[fol. 798] Thereupon, at the close of all the evidence in the case Counsel for defendants offered and filed with the Court a demurrer to the evidence.

The Court: How much time does the defendant want to argue?

Mr. Bowman: When will that be done? Do you mean right now? I thought we would file a statement of the law and the facts.

The Court: I am giving you five days to do that.

Mr. Bowman: Yes, sir. I think we could present our argument at that time.

The Court: I can hear you now or some later date. If you come to St. Louis I can hear you there.

[fol. 799] Mr. Bowman: Whenever we file that.

The Court: If they are going to do that I think it would be much more convenient at some date in St. Louis, after the findings of fact are in, so we will know what we are talking about.

The Court: I cannot set a date now, Gentlemen. I haven't my calendar with me, but I will notify you within the next few days.

Mr. Kelso: All right.

The Court: Now let the Counsel see that the Clerk has either exhibits or copies of all the exhibits that have been offered.

Mr. Blanton: We have several, Your Honor, that we will supply to the Clerk, that we have been referring to from time to time.

The Court: Announce an indefinite recess.

Thereupon, at 5:20 P. M., April 19, 1944, Court adjourned.

[fol. 800] Thereafter, to-wit, on Saturday, May 6, 1944, at an a. m. session, proceedings in this case were had before Honorable Rubey M. Hulen, District Judge, as follows:

Appearances.

For the Government, Harry C. Blanton, Esq.; M. Walker Cooper, Esq.

For Defendants, I. R. Kelso, Esq.; L. L. Bowman, Esq.; Homer Hall, Esq.

The Court: (Following arguments by counsel) Now the reporter is here, if you want to make a record, Major.

Mr. Hall: Now, if Your Honor please, I am not sure what Mr. Blanton and Mr. Cooper's thought is with reference to having that exhibit identified and a number given to it.

The Court: Let it be considered Exhibit No. 17. Is your last one 16?

Mr. Blanton: I do not have my record here, Your Honor, but whatever the last one in Cape Girardeau was, this may be considered the Government's succeeding exhibit.

The Court: Administrative Order No. 1?

Mr. Blanton: Dated July 1, 1939.

The Court: All right. Now what is your objection to [fol. 801] that exhibit, Major?

Mr. Hall: Now, if Your Honor please, Defendant Carmack objects to the exhibit and the offer for the reason that there has been no opportunity available to an examination of the witness relying upon this Administrative Order No. 1, this Exhibit No. 17, or whatever the number may be, signed by John M. Carmack, the Federal Works Administrator. The exhibit is incompetent and it is immaterial to any issues involved in this case and that have any purpose under the pleadings. We further object, Your Honor, because it seems to be an attempt to delegate legislative authority to other persons. For those reasons we object to the offer.

The Court: Objection overruled.

Mr. Hall: May I also add, Your Honor, for the same reasons also that were previously offered going to the foundation of this case?

The Court: It will be so considered.

Mr. Hall: Yes, sir.

[fol. 802] Department of Justice.
United States Attorney
Eastern District Of Missouri

St. Louis, Missouri 1
April 26, 1944.

Re: Cape Girardeau Post Office Site—Docket No. 482

Honorable Rubey M. Hulen
United States District Judge
New Federal Building
St. Louis 1, Missouri

Dear Judge Hulen:

Under date of April 22, 1944, I wrote Major Homer Hall, one of local counsel, in which I submitted a copy of the enclosed certified copy of Administrative Order No. 1, dated July 1, 1939, vesting authority in the Commissioner of Public Buildings to act for the Administrator of the Federal Works Agency, in accordance with our understanding when this case was tried before you at Cape Girardeau last week.

I have heard nothing from Major Hall and, in order that this exhibit may be before you as a part of our case, it is handed you herewith.

I am also mailing a copy of this letter to Major Hall.

It will be appreciated if you will identify the enclosure as one of our exhibits.

Respectfully,

HARRY C. BLANTON,
United States Attorney.

HCB:M
Encl.

[fol. 803] (United States Exhibit 17.)

Federal Works Agency
Washington

Office of the Administrator

I hereby certify that the annexed paper, Administrative Order No. 1 (Public Buildings Administration), is a true photostatic copy of the Order of the Administrator of the

Federal Works Agency, the original of which is on file in this Agency.

In Witness Whereof, I have hereuntil set my hand, and caused the seal of the Federal Works Agency to be affixed, on this 19th day of April, 1944.

Seal. Federal Works Agency United States Of America.

By direction of the Federal Works Administrator.

ALAN JOHNSTONE,
General Counsel,
Federal Works Agency.

[fol. 804] Federal Works Agency

Washington

Office of the Administrator

July 1, 1939.

Administrative Order No 1.

Public Buildings Administration

In order to facilitate the operation of Reorganization Plan No. I under the Reorganization Act of 1939, it is hereby ordered that:

(1) The Commissioner of Public Buildings is authorized to award and execute contracts for construction, repair, professional services, and leases necessary to carry out the functions of the Public Buildings Administration, and to authorize expenditures for travel and subsistence not involving change of station;

(2) Reserving the right of direct action by the Federal Works Administrator, authority is conferred upon the Commissioner of Public Buildings:

(a) To represent the Federal Works Agency at dedication ceremonies of public building projects within the jurisdiction of the Public Buildings Administration;

(b) To represent the Federal Works Administrator on the joint committee of the Federal Works Agency and the Post Office Department to select towns or cities in which buildings are to be constructed and the sites therein, subject to the final approval of the Administrator;

(c) To represent the Federal Works Administrator on the Foreign Service Buildings Commission;

(d) To approve cabinet sketches of public buildings; and the authority granted by this paragraph may be in turn granted to subordinate officials of the Public Buildings Administration, provided, however, that any decisions or approvals by any such subordinate officials in [fol. 805] the matters indicated in sub-paragraphs (b) and (d) hereof shall be subject to confirmation and approval by the Commissioner of Public Buildings;

(3) The Supervising Architect, Public Buildings Administration, shall act as Commissioner of Public Buildings in the absence of that official and in the absence of both the Commissioner of Public Buildings and the Supervising Architect, the Supervising Engineer, Public Buildings Administration, shall act as Commissioner of Public Buildings;

(4) The Fiscal Manager, and the Assistant Fiscal Manager, Public Buildings Administration, are each authorized, subject to prior appropriate approval, to effect modifications of contracts covering projects under the control of the Public Buildings Administration, provided no such modification results in or is estimated to result in an increase or decrease of more than Five Thousand Dollars ($5,000) in the contract price in any individual case, and to execute revocable licenses relating to real property under the control of the Public Buildings Administration;

(5) The Fiscal Manager, and the Assistant Fiscal Manager, Public Buildings Administration, are each empowered to authorize expenditures connected with the business of the Public Buildings Administration not exceeding Two Thousand Dollars ($2,000) in any individual case, except where by law the Federal Works Administrator is specifically required to authorize or approve expenditures;

(6) The Buildings Manager, Public Buildings Administration, is empowered:

(a) To authorize expenditures for the moving of Government property into or out of buildings constructed,

maintained, operated, or controlled by the Public Buildings Administration;

(b) To authorize expenditures for maintenance or operation, including supplies, materials, equipment and utility services, of buildings maintained, operated, or controlled by the Public Buildings Administration;

except where by law the Federal Works Administator is specifically required to authorize or approve expenditures;

(7) The Supervising Architect, the Supervising Engi- [fol. 806] neer, the Fiscal Manager, the Office Manager, the Buildings Manager, and the Chief of Planning and Space Control, Public Buildings Administration, are each empowered to authorize expenditures for travel and subsistence not involving change of station;

(8) The Commissioner of Public Buildings is authorized to act as "contracting officer" and to designate the "duly authorized representative" of such contracting officer under outstanding contracts heretofore awarded by the Treasury Department through the Procurement Division or by the Department of the Interior, through the Branch of Buildings Management of the National Park Service or otherwise, as may be transferred to the Federal Works Agency by Reorganization Plan No. I (except any contracts for the sale of Government real estate).

(9) All officers or employees of the Public Buildings Administration who, as officers or employees of the Treasury Department or the Department of the Interior, were authorized at the time of the taking effect of Reorganization Plan No. I to sign, approve, or certify requisitions, vouchers, payrolls, travel and subsistence orders not involving change of station, or other obligating documents, or to certify or approve advances of funds to disbursing officers or advances under the Subsistence Expense Act of 1926, 44 Stat. 688, as amended. (U.S.C. title 5, sec. 821, et seq.) or administratively to examine or approve accounts, or approve or grant applications for leave, shall continue, until further order, to sign, approve, certify or examine such documents, advances, or accounts and approve or grant applications for leave to the extent so authorized.

(10) In order to facilitate certain personnel adjustments in connection with the operation of Reorganization Plan No. I under the Reorganization Act of 1939, it is hereby ordered that:

(a) Appointments heretofore made by the Secretary of the Interior of employees to the Branch of Buildings Management, National Park Service, Department of Interior, who, owing to inability to report, did not enter on to their duties prior to July 1, 1939, are hereby adopted, ratified, and confirmed;

(b) Suspensions from duty and pay and separations from the service of employees formerly of the Branch of Buildings Management, National Park Service, Depart-
[fol. 807] ment of the Interior, heretofore approved by the Secretary of the Interior but not made effective prior to July 1, 1939, are hereby adopted, ratified, and confirmed.

(11) Until further order all contracts and all performance or payment bonds given in connection with contracts of the Public Buildings Administration shall, after approval by the Commissioner of Public Buildings of any individual sureties on any such bonds, be submitted to the Chief Counsel, Public Buildings Administration, for examination and approval prior to the execution thereof. After execution by the contractor, principal, and surety, such contracts and bonds shall be forwarded to the Commissioner of Accounts and Deposits, Section of Surety Bonds, Treasury Department, for examination and approval of corporate sureties and recording of individual sureties. After approval by the Commissioner of Accounts and Deposits, the executed contracts and bonds shall be forwarded to the Chief Counsel, Public Buildings Administration, for final approval.

JOHN M. CARMODY,
Federal Works Administrator.

[fol. 808] —Mr. Hall: Now, if Your Honor please, Your Honor will recall that Judge Kelso testified as a witness in this case, and that Mr. Hasson, counsel for the Government, identified and offered in evidence some letters that Judge Kelso had written. The offer was made, pre-

sumably, to discredit Judge Kelso's testimony and his position with respect to this matter.

Mr. Cooper: I think Major Hall is in error about the purpose of those letters. It went to show that those letters were considered by the committee.

Mr. Hall: Well, the letters speak for themselves, I presume, Your Honor.

The Court: Very well. Let's let them speak for themselves.

Mr. Hall: I desire to have marked as Defendant Carmack's Exhibits D and D-1, two letters that we inadvertently omitted to offer during the trial of the case.

The Court: Any objection to it?

Mr. Cooper: Not to the fact that it is not offered in order, we have no objection, certainly, on that ground, but we object to them for the reason they do not tend to prove or disprove any issue in this case. They are just simply to pat the back by Judge Kelso of Mr. Friant. One is just [fol. 809] a letter from one of the officials returning a letter of Mr. Kelso which had been given to him by Mr. Friant. Mr. Friant is not a man in authority to have anything to do with a decision in this case and it is just simply a letter of introduction and we think it is just simply encumbering the record. And if he is trying to rehabilitate the reputation which he seems to think has been impugned, that is not the way to do it.

The Court: Well, the reputation stands unimpeached. Objection to the exhibits sustained.

Mr. Kelso: Let the record show, Your Honor, that the exhibit that the Government offered at this argument contains a provision which recites the manner in which this City shall be selected as a site, and under that they offered an exhibit to show that Mr. Purdum, Smith and the Administrator of the Public Works Agency selected a site, and this exhibit shows that the witness appeared there and represented the interests of the City and others of the Chamber of Commerce in the selection of the site, and that Purdum, Smith (Smith W. Purdum) and the people therein referred to are the people who had the authority, and

he actually selected the City of Cape Girardeau as a proper location of a site, and that is a part of the exhibit [fol. 810] that they referred to here this morning, and I think, if for no other reason, as evidence in the light of the exhibit that they have offered under that order No. 1, that this should be considered.

The Court: Anything further now?

Mr. Hall: May I just ask, Your Honor, Your Honor's ruling is renewed after Judge Kelso's explanation?

The Court: One ruling is enough, I take it, on the exhibit.

Mr. Hall: I beg your pardon.

The Court: One ruling is enough.

Mr. Hall: Yes. Well, I just wanted to be sure that was considered.

The Court: Yes.

Mr. Hall: Now, may I, Your Honor, have those two letters marked as exhibits?

The Court: They are filed. I presume you want to file them as exhibits offered.

Mr. Hall: Yes. I would like to have the letter that is—

Mr. Cooper: You have identified them.

Mr. Hall: I don't know what Mr. Cooper means.

The Court: You have identified them. Go on.

Mr. Hall: I would like the letter dated October 26, [fol. 811] 1939, signed "Julien N. Friant", addressed to Honorable Smith W. Purdum, Fourth Assistant Postmaster General, marked as Defendant Carmack's Exhibit D-1; and the letter attached to it, dated October 31, 1939, signed "Smith W. Purdum", and addressed to Honorable I. R. Kelso, Cape Girardeau, Missouri, on the letterhead of the Fourth Assistant Postmaster General, Washington, marked as Defendant Carmack's Exhibit D-2.

(The said documents were marked by the reporter as Defendant Carmack's Exhibits D-1 and D-2, respectively.)

[fol. 813] The Court: Now, is there anything further, Gentlemen?

Mr. Bowman: One other thing I think ought to be straightened out, and that is all waiver of facts that are introduced after the original trial of the case, because we hold that the case cannot be retried, based upon facts that existed after the trial—the first trial of the case.

The Court: Well, the record has been made in that respect. Is there anything else? If not, we will adjourn.

(Mr. Bowman confers with the Court.)

The Court: Show it is overruled.

Which Was All The Evidence Offered In The Case.

[fol. 814] Suggested Findings Of Fact And Conclusions Of Law Submitted By Plaintiff.

(Filed in U. S. District Court on May 19, 1944.)

Suggested Findings Of Fact.

1. On the 25th day of September, 1941, John N. Edy Acting Administrator of the Federal Works Agency, requested the filing of a condemnation petition covering the land involved in this case. Given

2. That pursuant thereto the Attorney General, under date of October 16, 1941, authorized and directed the United States Attorney for the Eastern District of Missouri to file a condemnation suit against said land. Given

3. That the original petition, prepared under the direction of the Attorney General, was filed by the United States Attorney on the 22nd day of November, 1941 by permission of the Court. Given

4. That after the order of the District Court was reversed by the Circuit Court of Appeals, on the 26th day of April, 1943, a joint selection of the property involved in this suit as the New Post Office and Court House site in the City of Cape Girardeau was made by the Postmaster General and the Administrator of the Federal Works [fol. 815] Agency upon the recommendation of the Fourth Given

Assistant Postmaster General, Walter Myers and L. A. Simon acting for W. E. Reynolds, Commissioner of Public Buildings Administration of the Federal Works Agency, who were theretofore designated to act in that capacity by their respective superiors or by law.

Given 5. That pursuant to said joint selection and the request of the Administrator of the Federal Works Agency, the Attorney General under date of July 23, 1943 authorized and directed the United States Attorney to file an amended petition, which petition was filed on the 14th day of August, 1943 pursuant to the order of the Court.

Refused 6. That during July 1940, prior to said joint selection of the property in condemnation by the Postmaster General of the United States and the Administrator of the Federal Works Agency as aforesaid, all the sites in Cape Girardeau which were offered by the owners or their agents as possible locations for said Post Office and Court House site and some proposed sites which were not [offere]; but which were considered possibly available, were inspected by one M. J. Deutsch, a Post Office Inspector and site Agent who filed his written report with the Joint Committee on Public Buildings designated to pass upon such matters.

Refused 7. That two architects and one liaison officer from the Federal Works Agency made separate and independent trips to Cape Girardeau to consider the adaptability of the various sites under consideration; and one of said architects, H. A. Tucker, filed a written report with said Committee and the other architects, R. S. Hart, and the liaison officer, H. S. Roome, made oral reports to said Committee.

Refused 8. That E. W. Witman, Fiscal Manager of the Public Buildings Administration of the Federal Works Agency and J. F. Betterly made a special trip to Cape Girardeau in February of 1942 to discuss with the officials of that city and the interested citizens, the necessity of postponing any construction because of the War Emergency.

Given 9. That Frank Lowry, an attorney of the City of Cape Girardeau, now in the United States Army, appeared before the Joint Committee on Public Buildings, composed [fol. 816] of Messrs. Reynolds and Myers, on or about the

24th day of October, 1940 in opposition to the selection of the site now under condemnation as the site for the Post Office and Custom House of Cape Girardeau, Missouri and at the same time Harry Himmelberger, a citizen of Cape Girardeau, Missouri, appeared in support of the site now in condemnation for the Post Office and Court House Building in said City.

10. That on Nov. 19, 1940 Mr. I. R. Kelso of Cape Girardeau, Missouri, appeared as a taxpayer of the City of Cape Girardeau and as a representative of the Cape Girardeau Chamber of Commerce, before said Joint Committee, composed of Messrs. Reynolds and Myers and explained to the Committee his reasons for opposing the exchange of the property now in condemnation for the present Post Office building but suggested that the citizens of the City were very anxious to have some site promptly selected and the building constructed. At that time Mr. Kelso called particular attention to the petition containing six hundred and sixty-seven names submitted by John Sample protesting any action which would result in part of the Court House Park being used for Federal Building purposes, and suggested that the citizens of Cape Girardeau be allowed to vote on the matter of the Park site. That under date of November 29, 1940 Mr. Kelso transmitted a copy of a telegram to Mr. Reynolds, signed by himself, Mr. L. L. Bowman and Silas P. Lail, Presiding Judge of the Cape Girardeau County Court requesting the Federal Government to require a vote of the citizens of Cape Girardeau before entering into an exchange proposition with the City of Cape Girardeau.

Given

Refused

11. That R. B. Oliver III, City Attorney of the City of Cape Girardeau and Mayor Hinkle Statler of Cape Girardeau appeared before said Joint Committee at a meeting which was attended by Messrs. Reynolds, Myers, Witman, Betterly and Doyle, on or about September 17, 1940 and called attention to the avilability of the site now under condemnation for selection as a Post Office and Court House site in Cape Girardeau, Missouri and likewise suggested the possibility of an exchange of said site from the [fol. 817] City of Cape Girardeau to the [to the] Federal Government for the present Post Office building and the

Given

site thereof in said City, / and likewise pointed out the possibility that some question might be raised by opponents to the right of the City of Cape Girardeau to voluntarily convey the site now under condemnation. Refused

12. That pursuant to City Ordnance 906 of the City of Cape Girardeau, a special election was held in said City on March 4, 1941, at which there was submitted to the voters of said City the question as to whether said proposed exchange of the site now in condenmnation for the present Post Office building and site was approved or disapproved, resulting in the following, one thousand six hundred and twelve votes in favor of said exchange and one thousand three hundred and forty-four opposed thereto, giving a majority of two hundred and sixty-eight in favor of said exchange. Refused

13. That said Joint Committee composed of Messrs. Reynolds and Myers, prior to making their final recommendation to the Postmaster General and the Administrator of the Federal Works Agency, heard everyone who appeared before said Committee, / considered all the written documents filed therewith and all the oral and written reports submitted to them by their respective agents and by everyone else who desired to submit the same before finally recommending the site now in condemnation. Given Refused

14. That funds in the sum of $430,000.00 were available at the time of the joint selection of said site at the time of the filing of the petition and institution of the suit and are still available for the procuring of said site and the construction of said building. Refused

15. That the property in condemnation contstitutes less than two acres of a tract of four acres now constituting the Public Park upon which is located the present Common Pleas Court House and Library buildings, leaving as a portion of the park and as the property of the City a parcel of land that surrounds the parcel condemned on the North, East and South of more than two acres. Refused

16. On July 29, 1807, Louis Lorimier was the owner of [fol. 818] the tract now involved. Upon that date he executed a deed in proper form to the "District of Cape Refused

Girardeau" in the Territory of Louisiana, covering the tract in question. The deed contained the following provision:

"Whereas on the 13th day of January, 1806, in my proposals for having the Seat of Justice of this District permanently fixed on my land at this place I have promised and agreed to convey four acres of land to the District for the purpose of erecting the public building thereon in consequence whereof and of the acceptance of the Court the said four acres have been laid off in a place and in a manner approved of by the Commissioners appointed for that purpose and public buildings (viz: A Court House and Prison) have been erected on the same. Therefore, in compliance with the part of my said proposals and at the request of the Present Board of Commissioners and Assessors in and for the District aforesaid I do hereby give, grant, alien, convey and confirm unto the said Commissioners and Assessors in behalf and for the use of the District of Cape Girardeau the aforesaid four acres of land situate in this Town of Cape Girardeau * * * the said four acres of land so given to be and remain forever Common and Public and never to be appropriated to private use, agreeably to the explicit intention of the Donor: Under which limitations and conditions above expressed, I for myself and my Heirs the said four acres of land and all their appurtenances I do presently convey and deliver unto the said Commissioners * * * in fee simple * * *".

17. Soon thereafter Mr. Lorimier died. Subsequent to this death and prior to March 26, 1814, the permanent Seat of Justice was removed from its former location upon the tract in question to the City of Jackson, some eight miles distant. After the removal of the Seat of Justice, the Judges of the Court of Common Pleas of the County of Cape Girardeau in the Territory of Missouri, executed a quit-claim deed on March 26, 1814, on behalf of the County of Cape Girardeau (formerly the District of Cape Girardeau), to the heirs of Louis Lorimier, reciting the fact that the conveyance of the property had been upon condition that the permanent Seat of Justice should be maintained upon that tract and further reciting that the Seat of Justice had been removed and that the County, was re- [fol. 819] conveying the property to the heirs of Louis Lorimier.

Refused

Refused

18. Thereafter, on September 11, 1820, all of the heirs and legal representatives of Louis Lorimier conveyed the property now involved to the inhabitants of the Town of Cape Girardeau, Missouri, "collectively" for their use, benefit and behoof forever. "* * * for the convenience and encouragement of the inhabitants of the Town of Cape Girardeau and owners of lots in or near the same * * *." That deed contained the following provision:

"Provided always that the several tracts or parcels of land thus (tranted) to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property."

Several tracts were conveyed by this deed, some of which were used for specific purposes,—one for a public school, another for a church and another for a cemetery. The use of the tract now involved was not limited except insofar as the above quoted provision required that it be devoted to public use.

Refused

19. The property sought to be condemned is to be acquired for a public use, to-wit: the construction and operation of a Federal Post Office and Court House and has been devoted to public use for several years prior to the filing of this suit.

Refused

20. That by an Act of the Legislature of the State of Missouri approved the 24th day of February, 1843 the City of Cape Girardeau was incorporated and in said Act it was provided that title to the property theretofore belonging to the inhabitants of the Town of Cape Girardeau, or the trustees thereof in their corporate capacity, became vested in the Incorporated City of Cape Girardeau.

Refused

21. That the Town of Cape Girardeau mentioned in said hereinabove mentioned deeds became the City of Cape Girardeau.

Given

22. That the defendant Iska W. Carmack owns land in the City of Cape Girardeau, upon which she pays taxes, and resides outside but near the City Limits of the City of Cape Girardeau.

23. That pursuant to a proposal submitted by the City of Cape Girardeau and accepted by the Acting Commis- [fol. 820] sioner of Public Buildings of the Federal Works Agency, provision is made for the holding of the Court of Common Pleas now housed in the building erected upon the site in condemnation, in the present Post Office building and for the housing of the officers of said Court so that there will be no interruption of the Court pending the demolishing of the present Common Pleas Court House building and the erection and construction of the new building. Refused

24. That the selection was not arbitrary nor capricious, but was made after due consideration of all the factors entering into the selection of said site and after considering the public use to which said site was heretofore put and after duly considering the needs of the Government.

25. That the City of Cape Girardeau, Missouri was recommended for selection as one of the cities in which a United States Post Office and Court House Building was to be erected, and for which the sum of $430,000.00 was to be allocated, by S. M. Purdum, then Fourth Assistant Postmaster General and by W. E. Reynolds, Commissioner of Public Buildings, constituting a joint committee appointed by the Postmaster General and the Federal Works Administrator to recommend projects and building sites and that said recommendation was jointly approved by S. M. Purdum, Acting Postmaster General of the United States on June 11, 1940 and by John Carmody, Federal Works Administrator, on June 12, 1940. Given

Suggested Conclusions Of Law.

1. That the defendant, Iska W. Carmack is not entitled to any distributive interest in the proceeds or compensation to be paid for said property in condemnation.

2. That the use to which the Government seeks to put the property in condemnation is a public use.

3. That the City of Cape Girardeau was duly selected for the construction of a new Post Office and Court House building therein and that the site for said building in said City was duly selected by the joint action of the Post- [fol. 821] master General and the Administrator of the Federal Works Agency.

4. That the selection was not arbitrary nor capricious, but was made after due consideration of all the factors entering into the selection of said site and after considering the public use to which said site was heretofore put and after duly considering the needs of the Government.

5. That the United States has the right to condemn property for public use freed from any restrictions placed upon the title by former owners.

6. That the United States is authorized to condemn this property despite its devotion to other public uses.

United States District Judge.

Dated this day of , 1944.

[fol. 822] Request By Defendant, Iska W. Carmack For Findings Of Fact

(Filed in U. S. District Court on May 19, 1944.)

Now at the close of the whole case comes the defendant, Iska W. Carmack, with leave of Court, and requests the Court to find from the pleadings and evidence offered by all of the parties hereto, the following facts:

I.

Given The defendant, Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in the body of plaintiff's (Second) Amended Petition in Condemnation.

II.

Given The defendant, Iska W. Carmack, is an inhabitant, citizen, taxpayer, and owner of lots in and near said town (now city) of Cape Girardeau, Missouri, and is now and has been for many years prior to the institution of this proceeding, the owner of lots located in the town (now city) of Cape Girardeau, Missouri, upon which she has paid taxes.

[fol. 823] III.

The property sought to be condemned in this proceeding, includes all property upon which the public library building has been for many years, and is now located.

IV.

The property sought to be condemned by plaintiff in this proceeding as the site for the construction and maintenance of a Post Office and Custom House building at Cape Girardeau, Missouri, is located in the town (now city) of Cape Girardeau, Missouri. The property sought to be condemned in this proceeding is now and has been for many years continuously prior to the commencement of this proceeding devoted to public purposes (the Common Pleas Court House, city offices, public library, and public park). Given

V.

The property sought to be condemned in this proceeding is in the nature of a portion of a public park upon which is located a Court House used by the Court of Common Pleas of Cape Girardeau County, a Public Library building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the Library building. Given

The park upon which these structures are located is and has been used for gatherings of the Boy Scouts, and gatherings of various other groups. It is also used as a place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but is used for public speakings. The second story of the Court House is occupied by the Common Pleas Court, a judge's chambers, and a law library for the Court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the city engineer, the mayor, the city council, the city attorney, and also the clerk of the Court of Common Pleas. There is a basement in this building used largely for a storage place, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn certain of the park [the] property with the improvements thereon, except the Library building.

[fol. 823] VI.

The Public Library building located on the property sought to be condemned, is now and has been for many years past, continuously maintained as a Public Library building in which said City of Cape Girardeau, Missouri, now maintains, and for many years past has continuously maintained, a public library for the general public use, both as a public library and also additionally as a meeting place for civic organizations such as garden clubs, rose societies, historic societies, and other civic and public gatherings.

Given

The real estate on which the said Public Library building is located, together with all of the real estate adjacent to said Public Library building, is included in the description of the property sought to be condemned in this proceeding; the City of Cape Girardeau will be required to vacate said Public Library building situated on the said real estate sought to be acquired by the plaintiff in this proceeding, upon thirty days' notice by the Government, and, upon such notice, to remove said library and Library building from Government property within a reasonable time.

VII.

The land sought to be condemned was originally conveyed with other land in 1807 by its then owner, Louis Lorimier, to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the thirteenth day of January, 1806, to have the Seat of Justice of that District permanently fixed upon his land at that place. The deed contains provisions in the nature of conditions or limitations that the land so given should "be and remain forever common and public, and never to be appropriated to private use, agreeably to the explicit intention of the donor."

Given

VIII.

Between 1807 and 1814 the Seat of Justice had been removed from Cape Girardeau to Jackson; the judges of the Court of Common Pleas, in form, conveyed the property sought to be condemned, to the heirs of Louis Lorimier, and on September 11, 1820, all of the heirs of Louis Lori-

Given

mier, deceased, conveyed the premises by quit-claim deed to the inhabitants of the town of Cape Girardeau "col-
[fol. 825] lectively for their use, benefit, and behoof forever".

This deed of September 11, 1820, conveyed certain other property not involved in this proceeding, and concluded with the following paragraph: "Provided, always, that the several tracts or parcels of land thus granted to the town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property". The property sought to be condemned is included in said deed of September 11, 1820.

IX

Prior to and at the time the city officials submitted the offer to exchange the property sought to be condemned, said city officials represented that said city officials desired to negotiate with the United States Government for the exchange of the Court House park, city offices, Common Pleas Court House, and Public Library building, including the site of the Public Library building, for the present Post Office building located in said City of Cape Girardeau, Missouri. That said city officials claimed and represented that they based their authority to sell or dispose of the property sought to be condemned, upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929. That the alleged agreement between the city officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the present Post Office building and site for the property sought to be condemned in this proceeding, is based upon said representations as to the right and authority of the city officials to sell or dispose of property under said Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929. Given

X

The City of Cape Girardeau would be required to vacate the Public Library building located on the real estate sought to be condemned in this proceeding, upon thirty days' notice by the Government. Refused

XI.

The alleged joint action of the Postmaster General and [fol. 826] the Administrator of the Federal Works Agency in the alleged selection of the property sought to be condemned in this proceeding, was taken on the ..... day of June, 1943; the petition in condemnation to acquire the property sought to be condemned in this proceeding was filed in this Court (United States District Court, Eastern District of Missouri, Southeastern Division) as Civil Action, File No. 482, on the 22nd day of November, 1941; that the said alleged joint action of the said Postmaster General and the said Administrator of the Federal Works Agency was not had in this proceeding until after the United States Circuit Court of Appeals, Eighth Circuit, had entered a judgment reversing and [remainding] said condemnation suit for further proceedings in this Court (United States District Court, Eastern District of Missouri, Southeastern Division) in conformity with the opinion and mandate of the said United States Circuit Court of Appeals now on file in this Court as a part of the record in this proceeding.

Refused

XII.

The Supreme Court of the State of Missouri (Board of Regents for Normal School District No. 3 vs. Painter, Appellant, 102 Mo. 464; 14 S.W. 938) construed the deed from the Lorimier heirs of September 11, 1820 to the inhabitants of the town of Cape Girardeau.

Refused

XIII.

The property sought to be condemned in this proceeding as the site of a Post Office and Custom House in Cape Girardeau, Missouri, is already devoted to another public use, and for many years before the commencement of this proceeding had been so devoted.

Refused

XIV.

It is agreed by and between the plaintiff herein, and said defendant, Iska W. Carmack, "That Post Office Inspector, M. J. Deutsch was designated as the Government's only Site Agent to visit said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri, for the purpose of investigating and recommending to the Joint

Given as Altered

Committee considering the selection of the Post Office, Custom House, and Federal Court Building site at Cape Girardeau, Missouri, an available, suitable, and fitted site for the construction and maintenance of a Post Office, [fol. 827] Custom House, and Federal Court Building at Cape Girardeau, Missouri.

"That said Post Office Inspector, M. J. Deutsch, in fact visited the said City of Cape Girardeau, Missouri, from July 23 to 26, 1940, and from July 29 to 31, 1940, during which time the said Post Office Inspector, M. J. Deutsch, investigated each of the twenty-two (22) parcels submitted in response to the advertisement of the United States of America to submit proposals of sites for inspection.

"That the said Post Office Inspector, M. J. Deutsch, did, after considering facts pertiment to the site selection for the construction and maintenance of a Post Office, Custom House, and Federal Building at Cape Girardeau, Missouri, make a report to said Joint Committee considering the selection of said site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, wherein said Post Office Inspector, M. J. Deutsch, recommended as his first choice a site other than the public property sought to be condemned in plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause."

XV.

It is agreed by and between the plaintiff herein, and said defendant, Iska W. Carmack, that the person referred to in the evidence as Associate Architect, H. A. Tucker, "had no authority and was given no instructions to examine any sites offered at the "City of Cape Girardeau, Missouri, other than the site sought to be condemned, for the Post Office, Custom House, and Federal Court Building, but, acting under instructions dated September 25, 1940, of the said Joint Committee, visited Cape Girardeau between October 1 and October 7, 1940, for the purpose of obtaining such data as necessary to develop studies for utilizing the property sought to be condemned in the plaintiff's (Second) Amended Petition in Condemnation; and further,

Refused

"That the said H. A. Tucker had no authority, and was given no instructions to make any investigation of said other sites, and had no authority to make any recommendations to the said Joint Committee regarding the selection of a site for the new Post Office Building, Custom House, and Federal Court Building, at Cape Girardeau, Missouri, and, in fact made none."

[fol. 828] XVI.

It is agreed by and between the plaintiff herein, and the said defendant, Iska W. Carmack, "that H. S. Roome, Liaison Officer of the Federal Works Agency, had no authority, and was given no instructions to inspect any sites offered at the City of Cape Girardeau, Missouri, for the Post Office, Custom House, and Federal Court Building, and made none, but, acting under instructions of the Federal Works Administrator, dated November 20, 1940, the said Liaison Officer H. S. Roome conferred with City Officials at Cape Girardeau, Missouri, from November 24, to November 29, 1940, inclusive, for the purpose of negotiating a mutually satisfactory proposal to be submitted to the Government by the City Officials of Cape Girardeau, Missouri, for the exchange of the property described in Plaintiff's (Second) Amended Petition in Condemnation filed in the above entitled cause, for the old Post Office Building and site.

Refused

"The said Liaison Officer H. S. Roome agreed with the City Officials of Cape Girardeau, Missouri, on the form of proposal to be submitted to the Government for the exchange of property, but "made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri."

XVII.

It is agreed by and between the plaintiff herein, and the said defendant, Iska W. Carmack "That said Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, recommend the acceptance of the City's proposal which had been worked out as to form by the said H. S. Roome, Liaison Officer.

Given as Altered

"The recommended acceptance of the site sought to be condemned by the Joint Committee was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted to occupy [fol. 829] the present Federal Building and site at Cape Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

"The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time."

XVIII

In accordance with official instructions dated June 26, 1940, the said Post Office Inspector, M. J. Deutsch, the Government's only site Agent in this proceeding, did, on August 20, 1940, make an official report to the Administrator of the Federal Works Agency in which he recommended that the present Government-owned site be retained, and that the adjoining property, Site No. 2, offered by H. Bremermann be purchased for $15,000.00 and that a counter offer be made to the owner of Site No. 3, Ella M. Drum, to purchase this site for $600.00. In said report, the said M. J. Deutsch, in making said recommendation said: "This recommendation is made because it is believed that the present location is the most outstanding site in the city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction." Given

XIX.

The property sought to be condemned in this proceeding is within a public park on a high bluff approximately 40 feet above Spanish Street, upon which is located the Common Pleas Court Building, the Public Library building, the public bandstand, and other structures devoted to public use. The land sought to be condemned is fairly level, but there are steep slopes on the North, East, and South. These slopes are attractively terraced and are provided with Given

concrete steps. The property sought to be condemned does not include the terraces on the East and South, and does not extend as far North as the terraces. The property sought to be condemned does not have and would not have any entrance to said property from the East, South, or North. Between Spanish Street on the East and the property sought to be condemned, is a series of terraces of ap- [fol. 830] proximately 55 or 60 steps from Spanish Street to the East side of the property sought to be condemned. The terraces are not included in the condemnation are not usable as an approach nor entrance to the portions of the public park not included in this proceeding. The only entrance of the public to the portion of the park not included in this condemnation proceeding from Spanish Street would have to be made up the concrete steps and over Government property in order to reach the portion of the park not included in this condemnation proceeding from Spanish Street on the East. There is no street on the North, and no extrance from the North to the property sought to be condemned, except a walk-way over the portion of the city park lying North of the portion of said property sought to be condemned in this proceeding. There is no way to go to or from the portion of the park lying North of the property sought to be condemned and the portion of the park lying South of the property sought to be condemned, except over the property sought to be condemned in this proceeding. The only entrance by the public to the property sought to be condemned, will be a walkway of approximately 141 feet from Lorimier Street to the West side of the site of the proposed Post Office building. This proposed new location is about two blocks East and South of the present Post Office, the approximate center of the business section. This new location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of future business expansion or growth. A new building here would face a side street with only fair residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it would then be necessary to forego advantages with respect to the necessary approaches and driveways.

The said M. J. Deutsch, in his official report to the Administrator of the Federal Works Agency, in recommending the property sought to be condemned as the second choice for the site of the new Post Office and Custom House building at Cape Girardeau, said: "For Second Choice I have selected No. 1, the city-owned park, which could be developed into an attractive setting for a new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. The [fol. 831] bid submitted by the City is not intended to be a final offer, and it is expected that after a review of the facts by the Site Committee a counter-offer could be made with respect to a definite area of about 175′ x 215′ within the park grounds and with respect to improvements in surrounding approaches, removal of trees and fountain, and demolition of present city building. The mayor and city council verbally agreed to favor any reasonable counter-offer to be made by the Government. It is my opinion that the government-owned site is valued at approximately $225 per front foot, whereas the park site has a value of about $100 per front foot, and this must be taken into consideration in submitting a counter-offer. The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade."

The said M. J. Deutsch, in his said report, in referring to the Northeast corner of Themis and Fountain Streets, said: "There is considerable public sentiment in favor of the northeast corner of Themis and Fountain Streets, including the Greene corner and Bids 3, 7 and 9-A. This site would suit most of the business men as it would not change the status quo inasmuch as it would adjoin the present federal building." According to the report of said M. J. Deutsch filed with the Administrator of the Federal Works Agency, "This location adjoins the present federal building, close to what is regarded as the center of the business section and the most prominent corner in the town. If the city would take over the present federal building for a city hall and city court house, a new building on this site would create a civic center in this vicinity. This corner has considerable public sentiment in its favor, particularly because

it would maintain the status quo with regard to proximity to the three business districts." According to the report of said M. J. Deutsch, the Government's only Site Agent: Condemnation would appear to be necessary to secure the Greene property in opposition to considerable sentiment in favor of Miss Greene.

XX.

Prior to the institution of this proceeding on November 22, 1941, the Administrator of the Federal Works Agency did not act jointly with the Postmaster General in the al-[fol. 832] leged selection of the site for the construction of the proposed Post Office and Custom House Building. John N. Edy, the Acting Administrator of the Federal Works Agency, on September 25, 1941, did on said date address a letter to the Attorney General of the United States requesting that the Attorney General cause the necessary proceedings to be instituted for the condemnation of the property sought to be condemned; that prior to said September 25, 1941, the said John N. Edy had nothing to do with the transactions involved in this proceeding, the exception would be that he was the Acting Administrator the day that the papers were executed and he would have known nothing about it, and the signing of it would have been the only connection that he would have had with it, because in the normal conduct of his duties he would not have acted on the matter. He signed the original, that would be the only exception; that the said John N. Edy, the person who signed the alleged request to institute the proceedings in this case, just happened to be the Acting Administrator the day that said alleged request was signed, and that, acting in that capacity, the said John N. Edy signed whatever papers were put on his desk for signature; that the said John N. Edy, in addition to his other duties, acted as Administrator in the absence of the Administrator at that time; that the said Acting Administrator never at any time prior to the institution of these proceedings, acted jointly with the Postmaster General; that the said letter of said September 25, 1941 signed by the said John N. Edy as Acting Administrator of the Federal Works Agency to the Attorney General requesting the institution of the proceedings in this case, enclosed a copy of the Site Agent's report, and said copy of said Site Agent's report being a

Refused

copy of the report made to the Administrator of the Federal Works Agency by Post Office Inspector, M. J. Deutsch, the Government's only Site Agent in this proceeding.

XXI.

The alleged contract entered into by the City of Cape Girardeau, Missouri, with the United States of America, the plaintiff in this proceeding, nor a duplicate copy of the same, for the exchange of the property sought to be [fol. 833] condemned for the present site and Post Office building, was not on file with the Clerk of the City of Cape Girardeau, Missouri, from the date of the alleged execution of said contract down to the time of the trial of this case. That a duplicate copy of said alleged contract has not been available to the parties interested in the subject matter of this proceeding, nor to the public generally, at the office of the City Clerk of the City of Cape Girardeau, Missouri. Refused

XXII.

The evidence shows that a protest was made against the alleged offer of the property sought to be condemned in exchange for the present site and post office building by a petition for a referendum vote, signed by 2106 voters of the City of Cape Girardeau, Missouri, with the said City of Cape Girardeau on December 5, 1940. The evidence further shows that the said resolution or ordinance of December 4, 1940, was repealed on or about December 7, 1940, by the City Council of the City of Cape Girardeau. The evidence further shows that there was an attempt by alleged ordinance 905 of the City of Cape Girardeau, Missouri, adopted on February 11, 1941, which did not remain on file for one week subsequent to the introduction of said alleged ordinance 905, of the Mayor and City Council of the City of Cape Girardeau to reenact the said resolution or ordinance against which ordinance said petition for a referendum vote, signed by 2106 voters of the said City of Cape Girardeau, Missouri, was filed on December 5, 1940, and which said resolution or ordinance had been repealed without submitting said alleged ordinance to a referendum vote, as requested in the said petition for a referendum vote filed, on December 5, 1940, against said resolution or ordinance. Refused

The evidence further shows that alleged ordinance number 905 was passed by the Mayor and City Council of the said City of Cape Girardeau on February 11, 1941, which said alleged ordinance called for an election for the alleged purpose of testing the sense of the qualified voters of said city upon the proposition set out in said alleged ordinance 906. The passage of said alleged ordinance 906 was more than sixty (60) days after the filing, on December 5, 1940, of the said petition for a referendum vote on said ordinance or resolution of December 4, 1940, upon which said petition for referendum vote no action was ever taken by the Mayor and City Council of the City of Cape Girardeau.

[fol. 834] XXIII.

Refused

Under the pleadings and the evidence in this case, the Court finds that the plaintiff is not entitled to a decree of condemnation, as prayed for in its petition, and the finding of the Court will be in favor of the Defendant Iska W. Carmack on the issues in this cause.

[fol. 835] (Request of Defendant Iska W. Carmack for Conclusions of Law.)

(Filed in U. S. District Court on May 19, 1944.)

Now at the close of the whole case comes Iska W. Carmack, one of the defendants herein, with leave of Court and requests the Court to make, under the pleadings and evidence, the following conclusions of law:

I.

The answer of defendant, Iska W. Carmack, alleges facts, which, if true, would justify the conclusion that the Acting Administrator of the Federal Works Agency acted capriciously or arbitrarily in the alleged selection of the property sought to be condemned, as a site for a Post Office and Custom House at Cape Girardeau, Missouri.

II.

The defendant, Iska W. Carmack, has an interest in and to the property sought to be condemned, as one of the direct heirs of Louis Lorimier, the donor of that prop-

erty, which will permit her to maintain the defenses asserted by her as a direct heir of Louis Lorimier, deceased, for herself and others similarly situated.

III.

The defendant, Iska W. Carmack, has an interest in and to the property sought to be condemned, under the deed of [fol. 836] dedication of that property to public use, which will permit her to maintain the defenses asserted by her as an inhabitant, citizen, taxpayer, and owner of lots in and near said town (now city) of Cape Girardeau, Missouri, for herself and others similarly situated.

IV.

The Plaintiff, United States of America, has no right or power to acquire the property sought to be condemned, which is now and has been for many years devoted to another public use, namely, the Common Pleas Court House, city offices, Public Library building, public library, public monuments, bandstand, and public park, unless it appears from the evidence that the property sought to be condemned is the only available property reasonably fitted as a site for the new Post Office and Custom House at Cape Girardeau, Missouri, and that failure to secure said property devoted to another public use would result in the failure or destruction of a public project, namely, the construction of a new Post Office and Custom House at Cape Girardeau, Missouri.

V.

The right to determine whether the Administrator of the Federal Works Agency or the Postmaster General, or either of them, acted capriciously or arbitrarily in the selection of property already devoted to another public use, as the site for the new Post Office and Custom House at Cape Girardeau, Missouri, and in causing condemnation proceedings to be instituted to acquire that property, is a judicial question.

VI.

The plaintiff, United States of America, does not have the right and power to acquire property already devoted to another public use, for the purpose for which it seeks

to condemn the property in this proceeding, unless the [fol. 837] plaintiff, United States of America, alleges and proves that the property sought to be condemned is the only available property reasonably fitted for the public project and the failure to secure it would result in the failure of said public project, namely, the construction of a Post Office and Custom-House at Cape Girardeau, Missouri.

VII.

The present ownership of the property sought to be condemned, is material at this stage of the proceedings for the purpose of determining certain questions, before any orders, preliminary or otherwise, can be made in condemnation under the pleadings and evidence in this proceeding, for the following reasons:

(a) It is necessary to determine whether the property sought to be condemned is devoted to another public use.

(b) It is necessary to determine whether the property sought to be condemned, is the only available property reasonably fitted for the public project, namely, the site for the construction of a Post Office and Custom House at Cape Girardeau, Missouri.

(c) It is necessary to determine whether a failure to secure the property sought to be condemned would result in the failure of a public project, namely, the construction of a Post Office and Custom House at Cape Girardeau, Missouri.

(d) It is necessary to determine whether the Administrator of the Federal Works Agency ignored the opinion of the Supreme Court of the State of Missouri construing the deed from the Lorimier heirs of September 11, 1820, conveying the property sought to be condemned, to the inhabitants of the town (now city) of Cape Girardeau, Missouri.

(e) It is necessary to determine whether the Acting Administrator of the Federal Works Agency ignored the opinion of the Supreme Court of the State of Missouri construing the deed from the Lorimier heirs of September 11, 1820, conveying the property sought to be condemned,

to the inhabitants of the town (now city) of Cape Gir-
[fol. 838) ardeau, Missouri.

(f) It is necessary to determine whether the Postmaster General ignored the opinion of the Supreme Court of the State of Missouri, construing the deed from the Lorimier heirs of September 11, 1820, conveying the property sought to be condemned, to the inhabitants of the town (now city) of Cape Girardeau, Missouri.

(g) It is necessary to determine whether Thomas S. Rodney had any right, power, or authority whatever to join in the deed of September 11, 1820, conveying the property sought to be condemned, as guardian of Thomas Jefferson Rodney and Polly Rodney.

(h) It is necessary to determine whether the Postmaster General and the Administrator of the Federal Works Agency acted jointly in the selection of the land sought to be condemned in this proceeding, as the site of the new Post Office and Custom House at Cape Girardeau before the institution of the proceedings on November 22, 1941 to condemn that property.

(i) It is necessary to determine whether the Postmaster General and the Administrator of the Federal Works Agency, or either of them, ignored the only investigation made as to the merits of the sites offered at Cape Girardeau, Missouri, by Post Office Inspector, M. J. Deutsch, the Government's only Site Agent, before the institution of the condemnation suit in this proceeding on November 22, 1941.

(j) It is necessary to determine whether John N. Edy, as Acting Administrator of the Federal Works Agency, ignored the only investigation made of the merits of the sites offered at Cape Girardeau, Missouri, by Post Office Inspector M. J. Deutsch, the Government's only Site Agent in this proceeding.

[fol. 839] VIII.

The acquisition of the property by condemnation in this proceeding as a site for the new Post Office and Custom House at Cape Girardeau, will cause the destruction of the Common Pleas Court House and the Public Library build-

ing, and the discontinuance of the use of said property by the Cape Girardeau Court of Common Pleas, city offices, public library, park purposes, and other public use, contrary to and in violation of the express terms and conditions of the deed of dedication of Don Louis Lorimier of 1807, and contrary to and in violation of the express terms, provisions, and conditions of the quit-claim deed from the Lorimier heirs of September 11, 1820, as construed by the Supreme Court of the State of Missouri, the alleged selection of the property sought to be condemned, was arbitrary. In the event of a failure, for any reason, to use the property sought to be condemned, for the public purposes for which that property is now used, then and in that case the title to the property sought to be condemned would revert to the heirs of Louis Lorimier.

IX.

This action is being tried under the Laws of Missouri relating to the condemnation of property. Hence the law to be applied to the facts in this case with respect to the title of the property sought to be condemned, is the law of the State of Missouri as declared by the Supreme Court of Missouri with respect to the power of the City to exchange or convey the property sought to be condemned. Therefore, the Administrator of the Federal Works Agency, the Acting Administrator of the Federal Works Agency, the Postmaster General, and the plaintiff in this proceeding, are all bound by the opinion of the Supreme Court of the State of Missouri construing the deed from the Lorimier heirs of September 11, 1820, in the case of The Board [fol. 840] of Regents for Normal School District No. 3 vs. Painter Appellant, 102 Mo. 464; 14 S.W. 938, which deed is relied upon by the United States of America in this case.

X.

Under the terms of the deed from the Lorimier heirs of September 11, 1820 to the inhabitants of the town, as construed by the Supreme Court of the State of Missouri, the present City of Cape Girardeau has no power to exchange, or to contract to exchange or convey the premises to the plaintiff, and any agreement for the exchange of property sought to be condemned, for other property, is therefore, void.

XI.

Under the terms of the deed from the Lorimier heirs to the inhabitants of the town, as construed by the Supreme Court of the State of Missouri, the City of Cape Girardeau is but a trustee to manage the property sought to be condemned for the uses and purposes to which it was devoted by the donors. Therefore, the City of Cape Girardeau may control and regulate the use of the property sought to be condemned, but it has no right to devote the same to private uses, or even to public uses different from those specified in the deed.

XII.

The City of Cape Girardeau has no right, title, or interest in the property sought to be condemned, except the right, as trustee, under the deed of dedication, to manage that property for the uses and purposes to which it was devoted by the donors. Therefore, the City of Cape Girardeau has no right, power, or authority to cooperate with the plaintiff in this condemnation proceeding, and any contract or agreement to exchange the property sought to be condemned, for the present Post Office site and building, is worthless.

[fol. 841]

XIII.

The Administrator of the Federal Works Agency, the Acting Administrator of the Federal Works Agency, and the Postmaster General, acted capriciously or arbitrarily in the alleged selection of the property sought to be condemned, as a site for the new Post Office and Custom House at Cape Girardeau, Missouri, if it appears from the evidence:

(a) That the Postmaster General, the Administrator of the Federal Works Agency, or the acting Administrator of the Federal Works Agency, or any one of them, ignored the investigation and finding of facts and recommendations made by the Government's only Site Agent, Post Office Inspector M. J. Deutsch, with respect to the merits of the sites offered and considered by said Site Agent.

(b) That the Federal Works Administrator ignored the finding of facts and recommendations as to the merits of the sites offered at Cape Girardeau, Missouri, by the Government's only Site Agent, Post Office Inspector M. J. Deutsch.

(c) That John N. Edy, Acting Administrator of the Federal Works Agency, signed the request to the Attorney General of the United States for the condemnation of the property sought to be condemned, on September 25, 1941, without any information or knowledge relative to the merits of any site offered.

(d) That said John N. Edy, Acting Administrator, the person who signed the alleged request to institute the proceedings in this case on September 25, 1941, just happened to be the Acting Administrator the day that said alleged request was signed and that, acting in that capacity, the said John N. Edy signed whatever papers were put on his desk for signature.

(e) That said John N. Edy signed the said request to the Attorney General without any investigation whatsoever, and without any knowledge as to the merits of any site offered, except the information contained in the re- [fol. 842] port and recommendations of Post Office Inspector, M. J. Deutsch, the Government's only Site Agent in this proceeding.

(f) The opinion of the Administrator of the Federal Works Agency, the Acting Administrator of the Federal Works Agency, and the Postmaster General, or any one of them, relating to the matter of necessity of selecting property devoted to another public use as a site for the new Post Office and Custom House at Cape Girardeau, Missouri, must be based upon a reasonable and proper investigation as to the merits of the sites offered for that purpose and the law applicable to condemnation of property already devoted to another public use. Therefore, the officers of the Government, in carrying out the purpose of Congress in this proceeding, acted capriciously or arbitrarily in the selection of property already devoted to another public use, as a site for the new Post Office and Custom House at Cape Girardeau, Missouri, and in causing condemnation proceedings to acquire that property, if it

appears from the evidence; That the officers, in carrying out the purpose of Congress in this proceeding, ignored the report and recommendations of Post Office Inspector, M. J. Deutsch, the Government's only Site Agent in this proceeding, unless the plaintiff, by competent evidence, proves a different state of facts than those stated in said report of the said M. J. Deutsch, the Government's only Site Agent, which would justify the said officers in carrying out the purpose of Congress in this proceeding in ignoring the findings and recommendations of the said M. J. Deutsch, the Government's only Site Agent in this proceeding.

XIV.

While the Government, as a sovereignty, has inherent power to take public property essential to the public welfare, it exercises that power ordinarily pursuant to specific legislation. The right to determine what is a public use, [fol. 843] and when there is a public necessity, is, in the first instance, a legislative rather than a judicial question, but whether, in carrying out the purpose of Congress, an officer has acted capriciously or arbitrarily, is a judicial question. Necessity must be [conbined] with a public use, and a necessity for the public structure does not, under the pleadings and evidence in this case, imply a necessity for taking this particular property already devoted to a public purpose. That necessity was determined by John N. Edy, as the Acting Administrator of the Federal Works Agency, on September 25, 1941, as shown by his letter of that date signed by him as Acting Administrator of the Federal Works Agency, requesting the Attorney General to cause the necessary proceedings to be instituted for the condemnation of the property involved in this proceeding, and whether in determining the issue, he acted arbitrarily or capriciously, should be decided by the trial court.

Under the pleadings and evidence in this case, the Acting Administrator of the Federal Works Agency, the Administrator of the Federal Works Agency, and the Postmaster General, acted capriciously or arbitrarily in the selection of the property sought to be condemned in this proceeding, if said officers, or any of them, in carrying out the purpose of Congress in this proceeding, wholly ignored and disregarded the following undisputed evidence in this case:

(a) That the property sought to be condemned, is already devoted to another public use.

(b) That the property sought to be condemned, is not the only available property reasonably fitted for the public project, namely, a site for the construction of a Post Office and Custom House at Cape Girardeau.

(c) That the failure to secure the property sought to be condemned, would not result in the failure of a public project, namely, the construction of a Post Office and Custom House at Cape Girardeau, Missouri.

[fol. 844] XV.

While the United States has power to take property already devoted to a public use, for another public use, it has no right or power to take the property sought to be condemned in this case, which is already devoted to a public use, in the absence of express statutory authority or direction to take the property already devoted to another public use, unless the legislation as to the specific property sought to be condemned, that is, the acquiring of the Common Pleas Court House site and building, the Public Library site, and a portion of the public park for a site for a new Post Office and Custom House Building in the City of Cape Girardeau, Missouri, has been manifested in express terms or by necessary implication that such property might be taken. And in the absence of such legislation, the plaintiff is not entitled to condemn or acquire the property sought to be condemned in this proceeding.

XVI.

In the absence of express statutory authority or direction to take property already devoted to another public use, that authority will be denied, unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken.

None of the Acts of Congress mentioned in plaintiff's (Second) Amended Petition, and no Act of Congress has been called to the attention of the Court, and there is no Act of Congress of which the Court should take judicial notice which constitutes express statutory authority or direction to take the property sought to be condemned in

this proceeding which is already devoted to a public use, or which by necessary implication gives authority or direction to the plaintiff, or its officials, to take said property sought to be condemned which is already devoted to another public use.

[fol. 845]

XVII.

Since defendant, Iska W. Carmack, under the pleadings and evidence in this case, challenges the right of the plaintiff to select property already devoted to another public use, as a site for the new Post Office and Custom House at Cape Girardeau, Missouri, it is necessary for the plaintiff to allege the facts, if any, that were considered by the Administrator of the Federal Works Agency and the Postmaster General acting jointly, prior to November 22, 1941, in the selection of the property sought to be condemned. The only allegations contained in plaintiff's said (Second) Amended Petition relating to the determination of the public necessity for the taking of the property sought to be condemned, are allegations of the legal conclusions of the pleader set out in paragraph Sixth of plaintiff's (Second) Amended Petition. Hence, plaintiff's said (Second) Amended Petition is contrary to the opinion of the United States Circuit Court of Appeals, Eighth Circuit and is insufficient to justify any order or orders, preliminary or otherwise, in this proceeding to condemn property already devoted to another public use.

XVIII.

The City of Cape Girardeau has no authority to make any contract, unless the same shall be within the scope of its power or be expressly authorized by law.

XIX.

The alleged ordinance authorizing the contract to be entered into between the City of Cape Girardeau and the United States of America for the exchange of the property sought to be condemned in this proceeding for the site of the present Post Office and building in the City of Cape Girardeau, is not authorized by law.

[fol. 846]

XX.

The alleged election held for the purpose of authorizing the execution of the contract between the City of Cape

Girardeau and the United States of America, for the exchange of the property sought to be condemned, for the present Post Office site and building, is not within the scope of the powers of the said City of Cape Girardeau, or expressly authorized by law.

XXI.

The alleged election was not held pursuant to the law of this State governing the holding of an election upon referendum petitions, and is not within the scope of the powers of the City of Cape Girardeau, or expressly authorized by law. Hence, the alleged election held for the purpose of ratifying the action of the City in entering into a contract with the United States of America for the exchange of the property sought to be condemned, for the present Post Office site and building, is void and worthless for any purpose in this proceeding.

XXII.

It is the duty of the Clerk of the City of Cape Girardeau to keep on file in his office, all contracts, copies of contracts, and all papers and documents relating to the action of the City of Cape Girardeau in its negotiations with the plaintiff in this case for the exchange of the property sought to be condemned, for the present Post Office site and building.

XXIII.

And agreement of the City of Cape Girardeau to convey or exchange the site of the Public Library building, and to consent to the demolition and removal of the Public Library building located on the property sought to be condemned in this proceeding, is not within the scope of its powers or expressly authorized by law.

[fol. 847]

XXIV.

An agreement of the City of Cape Girardeau to convey and consent to the destruction and removal of the Common Pleas Court building, is not within the scope of its powers or expressly authorized by law.

XXV.

The question as to the failure or refusal of the Postmaster General, the Administrator of the Federal Works Agency, and the Acting Administrator of the Federal Works Agency, or any one of them, to consider pertinent facts and the law applicable to such facts in the alleged selection of the site sought to be condemned in this proceeding, is a judicial question to be decided by this Court. If the Postmaster General, the Administrator of the Federal Works Agency, and the Acting Administrator of the Federal Works Agency, or any one of them, disregarded substantial and uncontradicted facts having a bearing upon the question of the alleged selection of property already devoted to public use as a site for the new Post Office and Custom House building at Cape Girardeau, their action was arbitrary. Hence, the action of the Postmaster General, the Administrator of the Federal Works Agency, the Acting Administrator of the Federal Works Agency, or any one of them, in ignoring c disregarding substantial and [uncontradicted] evidence showing that there were other available and reasonably fitted tracts of ground offered as a site for the new Post Office and Custom House building at Cape Girardeau, Missouri, was arbitrary.

[fol. 848]

XXVI.

The record shows without dispute that the property sought to be condemned has been devoted to public use, not alone because the City of Cape Girardeau chose to do so, but it was required by the deed of dedication so to do. There was a legal obligation to maintain the property sought to be condemned, for the designated purpose.

XXVII.

The Cape Girardeau Court of Common Pleas, as now organized and existing, was established in 1851, as a Court of record, by the General Assembly of the State of Missouri, and has been continuously maintained as a Court of record with the same jurisdiction in civil cases as that of the Circuit Court of Cape Girardeau County; with concurrent jurisdiction with the Probate Court of Cape Girardeau County in all probate matters arising in Cape Gir-

ardeau Township of Cape Girardeau County; and, also, with jurisdiction in appeals from Justice of the Peace Courts in misdemeanors and civil cases arising in Cape Girardeau Township.

The salary of the Judge of the Court of Common Pleas is paid and has been paid out of the funds in the State Treasury, pursuant to the Act of the General Assembly of the State of Missouri. All fees received by the Clerk of the Cape Girardeau Court of Common Pleas are paid into the County Treasury, and the compensation or salary of the Clerk of the Cape Girardeau Court of Common Pleas is paid by Cape Girardeau County.

XXVIII.

The Court declares that under the law, the pleadings, and the evidence in this case, the plaintiff is not entitled to a decree of condemnation, as prayed for in its petition, and the finding and decree of the Court will be in favor of the Defendant Iska W. Carmack on the issues involved in this proceeding.

[fol. 850] (Memorandum Opinion, Findings of Fact, Declarations of Law and Order.)

(Filed in U. S. District Court on May 19, 1944.)

In The United States District Court Eastern District Of Missouri, Southeastern Division.

United States Of America, Plaintiff,
Docket No. 482 vs. At Law
Certain Land Situate In The City Of Cape Girardeau, County Of Cape Girardeau, State Of Missouri, and The City Of Cape Girardeau, Missouri, a Municipal Corporation, et al., Defendants.

This is the second trial of this case. It was instituted to condemn land in the city of Cape Girardeau, Missouri. The Public Buildings Administrator has recommended an expenditure of $430,000.00 for the erection (post war) of a Post Office and Court House on the proposed site. The issue is the right of the plaintiff to condemn the particular land described in the Second Amended Petition. Iska W.

Carmack, defendant, and heir of the donors of the land to the inhabitants of the city of Cape Girardeau has raised the issue. The first trial resulted in the Court holding that Iska W. Carmack had no interest that would permit her to raise and contest that issue. The Appellate Court held to the contrary and declared the law governing the right of plaintiff to condemn the land.*

[fol. 851] The evidence in this case as to Iska W. Carmack's interest is substantially the same as in the first trial. Her rights resulting therefrom having been heretofore decided, we will not go into that phase of the case.

In the opinion of the Court of Appeals the public use to which the property is now dedicated is described as follows:

"The property is in the nature of a public park upon which is located a court house used by the Court of Common Pleas of Cape Girardeau County, a public library building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the library building. The Park upon which these structures are located is used for gatherings of various other groups. It is also used as a place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but used for public speakings. The second story of the court house is occupied by the Common Pleas Court, a judge's chambers, and a law library for the court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the clerk of the Court of Common Pleas, the city engineer, the mayor, the city council and the city attorney. There is a basement in this building used largely for a storage place, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn all the property with the improvements thereon, 'except the library building' ".

The evidence as to the present public use of the proposed site, is the same as on the first trial. While "the

*Carmack vs. United States, 135 F. (2d) 196.

property is in the nature of a public park", plaintiff does not "seek to condemn all the property with the improvements thereon except the library building".

[fol. 852] The property described in the petition is a tract approximately 280 by 240 feet, near the middle of the Public park and bounded on the west by Lorimier Street. The north line of this tract is 150 feet from the north line of the park, the south line is 84 feet from the south line of the park, thereby leaving a strip of park 150 feet side on the north side of the proposed building site and a strip 84 feet wide on the south side of the proposed site. The park is bounded on the east by Spanish Street. Spanish Street is 40 feet below the level of the proposed site. To go from Spanish Street to the proposed site it is necessary to ascend approximately 60 steps. The east line of the proposed building site is near the top step, leaving approximately 100 feet between the east line of the proposed site and the east line of the city park. These strips of land thus remaining on the north, east and west, outside of the boundary lines of the proposed site are not sought by plaintiff and are to remain "park" property. (See Government Exhibit 5). This is the property which the plaintiff desires to condemn and the public use to which it is now devoted.

We pass to the law as declared by the Court of Appeals, by which the claim of right to condemn, asserted by plaintiff and challenged by defendant, must be determined. The fact that the land sought to be condemned is now being used for public purposes does not as a matter of law except the property from condemnation for another public purpose. If the purpose for which the site is sought is of superior rank with respect to public necessity to the public use now being made of it, the plaintiff should prevail. If the land described in the petition, although now devoted to public purposes, were the only available property reasonably fitted for the public project and failure to secure it would result in failure of the public project described in the petition, there would be no question of plaintiff's right to proceed. The right of plaintiff to condemn the land must stand or fall on the determination by this court of the question, did the Acting

[fol. 853] Administrator of Federal Works Agency and the Postmaster General, under the circumstances here presented, act arbitrarily and capriciously in selecting the site—was the act necessary? The term "arbitrarily and capriciously" has been defined to mean an act done "without adequate determining principle; not founded in the nature of things; not done or acting according to reason or judgment";* an unnecessary act. Defendant has the burden of proof.

the law under which plaintiff is proceeding provides that the Administrator of the Federal Works Agency and the Postmaster General must determine by their joint action location of sites upon which post offices are to be constructed. On the first trial there was a failure of proof of joint selection. It now appears no joint selection had been made prior to filing of the petition. Since the decision of the Court of Appeals, holding that proof of joint selection was a jurisdictional fact, the two public officers referred to have executed a site selection of the land described in the petition.

There is no evidence that either the Postmaster General or the Administrator of the Federal Works Agency were ever informed or even now know that the site selection that bears their signatures (U. S. Ex. 4) described land that is a public park or that the land was devoted to any public use—except for a "library building". As to the library building, they had no knowledge as to its being subject to removal "on 30 days notice".

The method of selecting a post office site, during the period here involved, is for a "Joint Committee" of two, to make the selection, prepare the instrument so declaring and present it to the Postmaster General and Administrator of the Federal Works Agency for their signatures. Such was the practice followed in this case, except approval was given after the suit was instituted and not

*4 C.J. 1476; Baisden vs. Floyd County Board of Education, 110 S.W.2d 671, 673, 270 Ky. 839; Corneil vs. Swisher County, Tex. Civ. App. 78 S.W.2d, 1072, 1074; Adams vs. Nagle, Pa., 58 S.Ct. 687, 693, 303 U.S. 532, 82 L.Ed. 999; Vernon's Ann. Civ. St. art. 752e; King vs. Falls County (Tex.) 42 S.W.2d 481, 482; Central of Georgia R. Co. vs. Mote, 62 S.E. 164, 170, 131 Ga. 136; Gen. St. 1935, 79-1409, 79-1602, 79-1702; Eureka Building & Loan Ass'n. vs. Myers, 78P. 2d 88, 71, 147 Kan. 609.

before. The "Joint Committee" consisted of the 4th Assistant Postmaster General and the Commissioner of [fol. 854] Public Buildings. The former acted by virtue of a statute, the latter acted pursuant to Administrative Order Number 1, dated July 1, 1939.

After designating Cape Girardeau as a place for construction of a new Post Office and Court House, twenty-two sites were submitted by various interested parties. Following receipt of these proposals the Joint Committee sent to Cape Girardeau Post Office Inspector M. T. Deutsch, for the purpose of investigating and making a recommendation to the Joint Committee "an available, suitable and fitted site" for the new Federal Building. Mr. Deutsch made his investigation and reported to the Joint Committee on August 20, 1940. In due time the site described in the Petition was selected by the Joint Committee. Its selection came about as a result of the representations by the officials of the City of Cape Girardeau, that they had a legal right to sell or exchange the park land.

Prior to Mr. Deutsch's visit to Cape Girardeau the city officials of that city conceived a plan of trading the Court House Park (of which the land described in the petition is a part) or a portion of it for the present "excellent" Federal Building and submitted, as one of the twenty-two sites a proposal to that effect.

Without quoting the Deutsch Report in full, in part it refers to the "Disadvantages" of the Park site here in issue as follows:

"This location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of [suture] business expansion or growth. A new building here would [fact] a side street with only fair residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it may be necessary to forego advantages with respect to necessary approaches and drive-ways".

Comparing the park site (described in the petition) with other sites the report concludes:

[fol. 855] "Considering the relative merits and the deterring features of the competing sites, I would give preference to the first three in the following order:

First Choice—Present Government-owned site, including Bid Nos. 2 and 3.

Second Choice—Site No. 1, the city-owned park.

Third Choice—The northeast corner of Themis and Fountain Streets, including the Greene corner, and Bid Nos. 3, 7, and 9-A.

It is my opinion that the present Government-owned site and adjoining ground is the most outstanding location in the city. Any of the other sites would be merely a compromise to avoid the demolition of the present federal building. While due regard must be given to public sentiment, it is obvious that the city park site, while it might provide an attractive setting, would present a problem to develop for practical utilization. The third choice would make a fairly suitable site, especially in the event that the present federal building would remain, but the lack of a bid from Miss Greene and the sentiment in her favor against condemnation is a serious obstacle." (Emphasis added).

As to the site recommended by the Deutsch Report as "First Choice", in preference to the Park site (described in the petition), the Deutsch report states:

"This is an excellent corner location facing the most prominent intersection in the city and on the principal business street. The center of the business section is not definitely ascertainable because of the diversion caused by the three business sections, but this corner is generally regarded as being the center of the business district. This location is about two blocks north and three blocks east of what might be designated as the center of delivery and the approximate center of population. It is directly across the street from the bus depot, the largest office building in the town, and the two principal hotels which are convenient for sessions of the Federal Court.

[fol. 856] The location is also conveniently situated with regard to the Southeast Missourian Publishing Company and the Missouri Utilities Company, two of the largest mailers in the city. Regardless of the fact that the trend of the business district is toward the west on Broadway, this would remain the principal and the most prominent intersection because of the character of the buildings now standing. The purchase price of the Bremermann property is reasonable, and the strip owned by Drum can no doubt be purchased for approximately $600."

The reason for the "Joint Committee" rejecting the recommendation of their site agent appears first in the Deutsch Report:

"An important advantage is that the exchange herein provided for (of Park site from the city for the present Federal Building) will allow the Government to dispose of the present federal building and site to a mutual advantage. No other acceptable offer for an exchange or sale of the present government property is securable.

Site No. 1, the city park property, is actively favored by the City Council, and almost unanimously favored by the business men on Main Street. It is pointed out that the proposed exchange would give the Federal Government a very prominent location in attractive surroundings, while the city would secure an excellent building for its city offices and city court, of which it is in need, without expense. On the other hand, there is considerable objection to this site because it is claimed that it would destroy the utility of the park which is a great asset to the city, and the city library north of this location would show up poorly in contrast if the new federal building were erected here.

Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. The president of the Chamber of Commerce decided not to give an opinion as to his preference.

[fol. 857] The postmaster, who has no financial or personal interest in any of the locations, but who is conscientious-

ly interested in civic development, regards the government-owned site as an outstanding location but recommends the city park as first choise because this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings. As a second choice, in the event that a trade with the city is not feasible, the postmaster prefers the present government-owned site." (Emphasis added)

The Deutsch Report closes with this recommendation:

"For First Choice I recommend that the present government-owned site be retained and that the adjoining property, Site 2 offered by H. Bermermann be purchased for $15,000, and that a counter offer be made to the owner of Site 3, Ella M. Drum to purchase this site for $600.

This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would present an advantageous or desirable transaction.

For Second Choice I have selected Site No. 1, the city-owned park, which could be developed into an attractive setting for the new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. The bid submitted by the City is not intended to be a final offer, and it is expected that after a review of the facts by the Site Committee a counter-offer could be made with respect to a definite area of about 175' x 215' within the park grounds and with respect to improvements in surrounding approaches, removal of trees and fountain, and demolition of present city building. The mayor and city council verbally agreed to favor any reasonable counter-offer to be made by the Government. It is my opinion that the government-owned site is valued at approximately $225 per front foot, whereas the park site has a value of about $100 per front foot, and this must be taken into consideration in submitting a [fol. 858] counter-offer. The question of the City Coun-

cil's authority to [to] make an exchange of this property is in dispute, but this could [not] doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade." (Emphasis added)

Defendant's Exhibit A is a stipulation of agreed facts entered into between the plaintiff and the defendant, Iska W. Carmack, since the first trial. This stipulation was entered into in Washington and introduced in evidence in this case in its entirety. The stipulation is approved by Harry L. McNerney, Attorney for the Federal Works Agency. Mr. McNerney was called as a witness in this case by the plaintiff. He stated he was Special Assistant General Counsel for the Federal Works Agency, and assisted in preparing defendant's Exhibit A. Referring to the contents of Exhibit A and that Exhibit A sets forth the basis upon which the selection of the site was made in this case this witness testified:

"It is my understanding that the chronological statement given to Judge Kelso contained all of the important items pertaining to the final selection of the New Custom House and Court House and Post Office site in Cape Girardeau; but the stipulation was prepared in first form by Judge Kelso and agreed to by Mr. Hasson representing the Department of Justice, and myself, based on what he had presented to us as embodying points he was to bring out, as were related in the chronological statement.

The Court: Were there material matters before the Department on which they based a decision, that are not in that agreed statement of facts or stipulation?

A. Not to my knowledge.

The Court: Is it your knowledge from an examination of the files in the department with which you are connected that this stipulation that you entered into covers material facts upon which the Department based its decision?

A. That is right." (Emphasis added)

The Stipulation states that Mr. Deutsch was the only Site Agent to visit the city of Cape Girardeau for the pur-

pose of making a recommendation to the Joint Committee considering selection of the Federal Building site. After [fol. 859] detailing the manner of Mr. Deutsch making his investigation the Stipulation recites that—

"Post Office Inspector, M. J. Deutsch, recommended as his first choice a site other than the public property sought to be condemned in plaintiff's second amended petition."

The Stipulation sets forth the facts regarding the public use of the park site and the facts regarding the chain of title by virtue of which the site is now used as a public park, and the conditions contained in the deed of dedication to the inhabitants of the City.

The Stipulation refers to the "agreement for exchange of property" between the city and the plaintiff, and then states that—

"The agreement between the city officials of the city of Cape Girardeau and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned" (emphasis added)

is based upon representations and claims by the city officials of the city of Cape Girardeau that they had power to make the [excyange].

The Stipulation concludes with this significant paragraph:

"The said Joint Committee considering the selection of site for Post Office, Custom House and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, recommend the acceptance of the City's proposal which has been worked out as to form by the said H. S. Roome, Liaison Officer.

The recommended acceptance of the site sought to be condemned by the Joint Committee was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted to occupy

the present Federal Building and site at Cape Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

[fol. 860] The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time." (Emphasis added)

We conclude from this record that the plaintiff concedes in this case that the selection of the site described in the petition, "was on the basis of exchange of the present Federal Building and site thereof" for the city park site described in the petition, as the result of the agreement between the City Officials and the plaintiff. In doing this did the Joint Committee base their act on a false premise, namely: a mistake of law; the law governing the right of the city to sell or exchange the whole or any part of the park site? "Item VI" of the Agreed Statement of Facts reads as follows:

"Item VI. Agreement to Exchange Property

That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the Old United States Post Office Building located in said City of Cape Girardeau, Missouri;

That said City Officials claimed and represented that they based their authority to sell or dispose property upon Section 7210 and 7211 of the Revised Statutes of Missouri, 1929; That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the Old Post Office Building and site for the property sought to be condemned.

is based upon said representations as to the right and authority of the City Officials to sell or dispose property under said Section 7210 and 7211 of the Revised Statutes of Missouri 1929." (Emphasis added)

[fol. 861] The decision of the Court of Appeals in this case states:

"The record shows without dispute that the property (described in the petition) has been devoted to public use, not alone because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose." (Emphasis added)

[fol. 862] this obligation rests upon the city officials. The lack of power on the part of the City to sell or exchange the property in question has been passed on by the Supreme Court of Missouri. See Board of Regents, et al. vs. Painter, 102 Mo. 464. The Supreme Court of Missouri was passing upon the right of the city to dispose of a parcel of the same land, described in the deed by which the park was conveyed and dedicated to Public use. In part, the Court said:

"This being so the city had no right or power to convey the lot to the plaintiff. It could no more convey the lot to plainfiff than it could the other parcel called a public square."

The "public square" referred to in the Supreme Court opinion is land part of which is described in the petition. The use of the "public square" for a Post Office and Federal Court Building, which would destroy the practical use of the public square, is as much a departure from the public use for which the property was dedicated, as in the case passed upon by the Supreme Court of Missouri.

The City of Cape Girardeau being without legal right to sell or exchange any part of the park property and having a legal obligation to maintain the property for the designated public purpose set out in the instrument of conveyance, by virtue of which it now occupies the site, we can not conclude other than that this proceeding was filed in aid of and had as its primary object the execution of the agreement made by the city officials to exchange the park

property for the present Federal Building, and that the Joint Committee is designating the park site and in turn submitting its selection to the Postmaster General and Director of Federal Public Works, proceeded and acted under a mistake of law as to the right of the City to sell or exchange the land known as the City Park. Had the lawful rights of the city officials of Cape Girardeau been correctly understood by the Joint Committee (that they were without a legal right to sell or exchange the park property) the site would not have been selected, in the opinion of this Court.

[fol. 863] Mr. Tucker, Architect for the Public Building Administration, sent to Cape Girardeau to investigate the park site, made this recommendation:

"If the city officials can legally trade their publicly-owned Court House Park site for the present Post Office building and land, I recommend it be accepted, and if that is not legally possible, I then recommend the Post Office be sold to the city and land purchased in some other location for the new Federal building." (Emphasis Added)

We find in the Deutsch report a like statement as representing the judgment of the Postmaster at Cape Girardeau. Nowhere in the record is there any mention of an intention to take the park site, except by agreement with the city.

There is another point in the record that we think worthy of note, from which it appears that the City Officials acted on a mistaken assumption — one of fact. Defendant offered in evidence the deposition of Harlan Bartholomew. Mr. Bartholomew's business is civic engineer and city planner of wide experience, having taken part in development of civic plans in over sixty American cities, including Washington, Pittsburgh, St. Louis, Los Angeles. Mr. Bartholomew was employed by the Chamber of Commerce of the city of Cape Girardeau to prepare a "civic plan" for the city of Cape Girardeau. In part it will be found attached to plaintiff's Exhibit 16. H. Arthur Tucker, in September of 1940, visited Cape Girardeau for the purpose of investigating "conditions on and around the so-called Court house site, which has been offered in exchange

for the present owned Federal property, for use as a site for the proposed Post Office and Court House Building", Mr. Tucker's Report is United States Exhibit 16. This report contains this paragraph regarding the objective of the city officials of Cape Girardeau, with reference to the Bartholomew plan and the new Federal building.

"The above-mentioned city officials favored any scheme developed by the Government in locating this new Post Office and Court House which would be in accordance with and also which would expedite the commencement of proposed Civic Center." (Emphasis added)

[fol. 864] On this subject Mr. Tucker concludes as follows:

"Because the proposed new Federal Building without doubt, will be the largest and most imposing building to be built in this Civic Center (referring to the Bartholomew plans) it seems obvious that it should be the building erected on the most prominent site of the plan. With the present city-owned park site therefor established as the most prominent feature or focus of the Civic Center, it leaves only the exact location of a building on that site to be determined."

On the other hand Mr. Bartholomew, originator of the Civic plan, testified on location of the new Federal Building on the Court House park, as follows:

"I would say that it is unfortunate — most unfortunate."

We believe the action of the Joint Committee, in the proceeding under a mistake of law, is decisive of this case adverse to the plaintiff, but we do not base our holding on that point alone.

The cause must be considered under those rules of law applying to condemnation proceedings under a general act, which does not specify any certain property shall be condemned. We are not presented with a case, such as State of Minnesota vs. United States, 125 F. (2d) 636, where Congress provided for the creation of an Indian reserve, and specified the land to be taken, and in taking the land authorized by statute it became necessary to take land owned and used by the State for a public purpose — a

conservation project. In the case at bar plaintiff is acting under a general act and is attempting to take public property already devoted to sound, recognized, lawful, desirous and necessary public purposes. In the opinion of the Court of Appeals it was said:

"In the absence of express statutory authority or direction to take property devoted to another public use, that authority has been denied unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken." (Emphasis added)

[fol. 865] It was stated in U. S. vs. Certain Land in Town of New Castle, 165 F. 783, (l.c. 789)

"The presumption is that authorized public uses are not to be interfered with under mere general terms of Federal or State legislation."

Necessity for taking the particular site in issue in this case; whether the park site was the only avilable property reasonably fitted for the public project and failure to secure it might result in the failure of a public project; that another site was more desirable and better fitted,—if these questions were debatable, defendant would have failed to carry the burden of proof.

In the case of In re: Certain Lands in Lawrence, 119 F. 453, the Court said (l.c. 466):

"I doubt if it can be laid down without qualification, that the public use of a Post Office is in all places superior to the public use of a park".

We believe a public library, with the building being put to the use to which the one on the park site is now being put, rises to the importance of a park, to say the least.

In the case of United States vs. Certain Parcel of Land in the town of Denton, 30 F. Supp. 372, the question presented was not the taking of the site of a court house building, but whether or not the erection of a Post Office on a tract of land occupied by a Court House would interfere with court proceedings. The right to condemn was granted but the Court said:

"If the evidence required a finding that the site selected would materially affect judicial administration in Caroline County, quite a different case would be presented."

Here a valuable city park and its present public uses will be destroyed if plaintiff condemns the park site. The City has given bond to remove by wrecking or otherwise, the present Common Pleas Court House, where Court is held; the building is also used for the city government. Certainly during the course of construction of the new building, judicial administration will be affected. There [fol. 866] appears to be no definite arrangements for the Court of Common Pleas insofar as this record is concerned. There is no suggestion for the future of the public library and the building in which it is located — other than removal of the building "on thirty days notice". There is no necessity for the destruction of these public services, conveniences and improvements. Necessity is not even claimed by the plaintiff.

We are not unmindful that in only rare instances has the plaintiff been denied the right of condemnation. A reading of the authorities, however, does not reveal any case, where condemnation was authorized, where the plaintiff has attempted to proceed by condemnation to effectuate an agreement which one of the parties had no legal right to enter into, and the resulting interference with present public uses of the land sought by the Government's action was so destructive as appears in the present case.

Nowhere in the record do we find any claim by plaintiff that the site proposed is the only available property, reasonably fitted for the public project, or that failure to secure it would result in failure of the project.

Upon the record this Court cannot find that the site described in the complaint is the only available property, reasonably fitted for the public project, when the plaintiff's own representative, chosen because of his knowledge and ability to select sites, has placed another site superior in desirability to the site sought. With this admission of plaintiff's representative this Court cannot find that the failure to secure the site described in the petition would result in failure of the public project. These facts support defendant's position in this case. Nor was there the slightest

effort made in this case by the plaintiff to show a necessity for taking the particular property here involved, already devoted to a public purpose. On the contrary the evidence is undisputed and comes from an unimpeachable source, the government's witnesses, that there is no necessity for [fol. 867] taking the particular property described in the petition. That another location is preferable is an unchallenged fact in this case. Consequently there can be no necessity by implication. Plaintiff proceeding under a general act, its case must fail for that reason also.

The plaintiff is content, or rather forced to be, to rest its case solely upon the right of the city to sell or trade the park property, coupled with the rule that selection of the site by authorized officers carries an assumption that the decision was based on facts justifying the action taken, until the contrary be shown. The contrary has been shown in this case.

All these questions are aside from the evidence of public sentiment for various sites. It is doubtful if any site is ever selected that is acceptable to all residents of any town or city. Certainly the evidence shows a very sharp division of opinion in Cape Girardeau on the selection of the site here under consideration. This has been the case from inception of the project and will, no doubt, continue to the end. Much of the opposition to the present site is no doubt due to sentiment for the Court House Building that is to be destroyed, the attractive park that has been built around it, the statues and fountain placed there through the years, that must be moved, the public library that must be moved. Such sites and structures have a strong appeal to many people. They are things that represent the character of a community, its people and its civic pride. To ignore such an appeal, to sanction the destruction of such public enterprises and institutions does not appeal to the Court, in the absence of some showing of necessity therefor.

We note there was offered in evidence the proceeding leading up to and the holding of an election on the park site. The evidence is of little value to the issues. Only one site was submitted to the voters and that was presented as a question of the city making the trade discussed heretofore. Such procedure could not give legal effect to a transaction the city was powerless to perform.

[fol. 868] Certain conclusions suggest themselves which should be stated. This is not a case, in fact, where the representatives of the plaintiff have gone to the city of Cape Girardeau and designated the most imposing tract of ground in the city from a landscape viewpoint and which is now used as a public park, for the site of the new Federal Building. And this notwithstanding the site is not in the trend of business nor accessible except from one street. That while the plaintiff will not take all the park, it will take a sufficient part of the park to destroy its usefulness as park. That the plaintiff has proceeded to issue an order for the destruction of the public buildings on the site; buildings in which necessary public business is now transacted, including the Court of Common Pleas, Departments of City Government and the storage of valuable records, and granted to another building in which a public library is housed "thirty days" to vacate. That this action was taken by the Joint Committee, with information in their possession with respect to availability of other sites which shows unquestionably that the action of the plaintiff is unnecessary and the site selected is not now, nor was it when selected, the most desirable and available. If this were the cold record, we believe few would question the conclusion that such action by the Joint Committee was arbitrary and unnecessary. Nevertheless the conclusions, as outlined above, are present as a matter of law on the record in this case. The evidence shows that plaintiff was caused to take action which leads to the same results as outlined above, by virtue of the solicitation and entreaty of the city officials of Cape Girardeau, which solicitation crystalized in an agreement between the city officials of the city of Cape Girardeau and the Government officials to trade the park site (described in the petition) for the present Federal Building. The city officials of Cape Girardeau, no doubt acting in perfect good faith, represented to plaintiff or the Joint Committee to sell or exchange the park site. Also acting in perfect good faith the officials of plaintiff and Joint Committee "relied" upon the representations of the Cape Girardeau City Officials as to their legal right to sell or exchange the park [fol. 869] site, and the Joint Committee so relying, "based" their decision as to site selection, upon such erroneous representation. The City of Cape Girardeau be-

ing without a legal right to sell or exchange the park property, as held by the Supreme Court of Missouri and in the opinion in this case by the Federal Court of Appeals, leaves the action of the Joint Committee in selecting the park site in the same status, as a matter of law, as if no exchange negotiations had taken place, and the plaintiff's officials had never been induced to consider the site upon the basis of the proposed exchange.

In the case of Thompson vs. Consolidated Gas Utilities Co., 300 U. S. 55, the Supreme Court had before it the question of legality of a gas proration order issued by the Railway Commission of Texas, ostensibly for the purpose, among others, of preventing the waste of gas. We think what the Court said with respect to the presumption of the existence of facts justifying the specific exercise of the power there under consideration, applies to the selection of a site for a post office made by and under authority of those agents of the Government to whom such duty has been delegated. Referring to the order in the Thompson case, the Court said (l.c. 69)

"It is settled to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise. * * The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property."

A consideration of all the facts justifies the conclusion that defendant has sustained the burden of proof placed upon her; that the selection of the site described in the petition, under all the circumstances, condition and facts referred to, amounts in law to an arbitrary and unnecessary act. Plaintiff's Second Amended Petition will be dismissed.

[fol. 870] Findings Of Fact.

I.

The City of Cape Girardeau, Missouri was recommended for selection as one of the cities in which a United States Post Office and Court House Building was to be erected, and for which the sum of $430,000.00 was to be

allocated, by S. M. Purdum, then Fourth Assistant Postmaster General and W. E. Reynolds, Commissioner of Public Buildings, constituting a Joint Committee appointed by the Postmaster General and the Administrator of Federal Works Agency to recommend projects and building sites, and that said recommendation was jointly approved by S. M. Purdum, Acting Postmaster General of the United States on June 11, 1940, and by John Carmody, Federal Works Administrator on June 12, 1940.

II.

During 1940 some 22 sites in Cape Girardeau were offered by the owners or interested parties as possible locations for said Post Office and Court House.

III.

Post Office Inspector M. J. Deutsch was designated as the Government's only site agent to visit the city of Cape Girardeau for the purpose of investigating and recommending to a Joint Committee, considering selection of Post Office and Custom House site, an available and suitable suite; that the said M. J. Deutsch visited the city of Cape Girardeau during July of 1940 and investigated the sites which had been submitted; that after considering facts pertinent to the site selection the said M. J. Deutsch did make a report to said Joint Committee considering the [fol. 871] selection of said site and recommended as first choice a site other than the tract of land described in the Second Amended Petition.

IV.

In accordance with the official instructions dated June 26, 1940, Post Office Inspector M. J. Deutsch did, on August 20, 1940, make an official report to the Administrator of the Federal Works Agency in which he recommended that the present Government-owned site be retained, and that the adjoining property, Site No. 2, offered by H. Bremermann be purchased for $15,000.00 and that a counter-offer be made to the owner of Site No. 3, Ella M. Drum, to purchase this site for $600.00. In said report, M. J. Deutsch, stated:

"This recommendation is made because it is believed that the present location is the most outstanding site in

the city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction."

V.

Frank Lowry, an attorney of the city of Cape Girardeau, appeared before the Joint Committee on Public Buildings, composed of Messrs. Reynolds and Myers, on or about the 24th day of October, 1940, in opposition to the selection of the site described in the petition as the site for the Post Office and Custom House of Cape Girardeau, Missouri, and at the same time Harry Himmelberger, a citizen of Cape Girardeau, Missouri, appeared in support of the same site for the Post Office and the Court House Building in said City.

VI.

On November 19, 1940, Mr. I. R. Kelso of Cape Girardeau, Missouri, appeared as a taxpayer of the City of Cape Girardeau, and as a representative of the Cape Girardeau Chamber of Commerce, before said Joint Committee, and explained to the Committee his reasons for opposing the exchange of the property now in condemnation for the present Post Office building, but suggested that the citizens of the City were very anxious to have some site promptly selected and the building constructed. At that time Mr. Kelso called particular attention to the petition containing six hun-
[fol. 872] dred and sixty-seven names submitted by John Sample protesting any action which would result in part of the Court House Park being used for Federal Building purposes.

VII.

That Mr. R. B. Oliver, III, City Attorney of the City of Cape Girardeau and Mayor Hinkle Statler of Cape Girardeau appeared before the Joint Committee, on or about September 17, 1940, and called attention to the availability of the site now under condemnation for selection as a Post Office and Court House site in Cape Girardeau, Missouri, and likewise suggested the possibility of an exchange of said site from the City of Cape Girardeau to the Federal Government for the present Post Office building and the site thereof in said City.

VIII.

Prior to and at the time the city officials submitted the offer to exchange the property sought to be condemned, said city officials represented that said city officials desired to negotiate with the United States Government for the exchange of the Court House park, city offices, Common Pleas Court House, and public Library building, including the site of the Public Library building, for the present Post Office building located in said City of Cape Girardeau, Missouri. That said officials claimed and represented that they based their authority to sell or dispose of the property sought to be condemned, upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929. That the alleged agreement between the city officials of the city of Cape Girardeau, Missouri, and the United States of America for the exchange of the present Post Office building and site for the property sought to be condemned in this proceeding, is based upon said representations as to the right and authority of the city officials to sell or dispose of property under said Sections 7210 and 7211 of the Revised Statutes of Missouri 1929.

IX.

The Joint Committee, prior to making their final recommendations to the Postmaster General and the Ad- [fol. 873] ministrator of the Federal Works Agency, heard everyone who appeared before said Committee.

X.

The Joint Committee, considering the selection of the site for Post Office and Federal Building at Cape Girardeau did, on April 7, 1941, recommend the acceptance of the city proposal, which had been worked out as to form by H. S. Roome "liaison officer of the Federal Works Agency".

XI.

The recommendation of the Joint Committee of the site described in the Second Amended Petition was on the basis of an exchange of the present Federal Building and site thereof for the land described in the amended petition and acceptance by the plaintiff was with the understanding that

plaintiff would be permitted to occupy the present Federal Building until after the proposed building had been completed and made ready for occupancy.

XII.

The acceptance was recommended by the Joint Committee with the agreement on the part of the city officials of the city of Cape Girardeau, Missouri, and that the city would vacate the premises, known as the library building, upon thirty days notice, and remove the building within a reasonable time.

XIII.

The Joint Committee would not have recommended the park site described in the amended petition if they had known, prior to taking such action, the city of Cape Girardeau was without power to legally transfer or exchange the park property to the Government for the present Federal Building site.

XIV.

Prior to making the selection of the site described in the petition the Joint Committee relied upon and thereafter acted upon the representations of the city officials of the city of Cape Girardeau that they had a legal right to sell or exchange the park site, described in the amended petition, for the present Federal Building site.

[fol. 874]

XI.

Prior to the institution of this proceeding on November 22, 1941, the Administrator of Federal Works Agency did not act jointly with the Postmaster General in the selection of the site for the construction of the proposed Post Office and Court House in Cape Girardeau.

XVI.

On the 25th day of September, 1941, John N. Edy Acting Administrator of the Federal Works Agency, requested the filing of a condemnation petition covering the land involved in this case.

XVII.

That pursuant thereto the Attorney General, under date of October 16, 1941, authorized and directed the United States Attorney for the Eastern District of Missouri to file a condemnation suit against said land.

XVIII.

That the original petition, prepared under the direction of the Attorney General, was filed by the United States Attorney, on the 22nd day of November, 1941, by permission of the Court.

XIX.

That after the order of the District Court was reversed by the Circuit Court of Appeals, on the 26th day of April, 1943, a joint selection of the property involved in this suit as the New Post Office and Court House site in the City of Cape Girardeau was made by the Postmaster General and the Administrator of the Federal Works Agency upon the recommendation of the Fourth Assistant Postmaster General, Walter Myers and L. A. Simon acting for W. E. Reynolds, Commissioner of Public Buildings Administration of the Federal Works Agency, who were theretofore designated to act in that capacity by their respective superiors or by law.

XX.

That the action of the Postmaster General and Administrator of Federal Works Agency, referred to in the pre- [fol. 875] ceding paragraph, would not have been taken but for the recommendation of the Joint Committee consisting of the Fourth Assistant Postmaster General and the Commissioner of Public Buildings Administration; that the joint selection referred to in the preceding paragraph was prepared for the signatures of the Postmaster General and Administrator of Federal Works Agency and they signed same without any independent knowledge of the circumstances or facts upon which said selection was based and wholly and solely upon the recommendation of the Joint Committee, consisting of the Fourth Assistant Postmaster General and Commissioner of Public Buildings Administration, and Fourth Assistant Postmaster General

and Commissioner of Public Buildings Administration would not have made said recommendation, which was so acted upon, but for the representations that had been made to them by the officials of the city of Cape Girardeau that they, the officials of the city of Cape Girardeau, had a legal right to sell or exchange the park site for the present Federal Building site in Cape Girardeau, and that said representation was relied upon and acted upon by said Fourth Assistant Postmaster General and Commissioner of Public Buildings Administration.

XXI.

That pursuant to said joint selection and the request of the Administrator of the Federal Works Agency, the Attorney General under date of July 23, 1943 authorized and directed the United States Attorney to file an amended petition, which petition was filed on the 14th day of August, 1943 pursuant to the order of the Court.

XXII.

The land sought to be condemned was part of a larger tract originally conveyed in 1807 by its then owner Louis Lorimier to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the thirteenth day of January, 1806, to have the Seat of Justice of that District permanently fixed upon his land at that [that] place. The deed contains provisions in the nature of conditions or limitations that the land so given should "be and remain forever common and public, and never to be appropriated to private use, agreeably to the explicit intention of the donor."

[fol. 876] XXIII.

Between 1807 and 1814 the Seat of Justice had been removed from Cape Girardeau to Jackson; the judges of the Court of Common Pleas, in form, conveyed the property, including that sought to be condemned, to the heirs of Louis Lorimier, and on September 11, 1820, all of the heirs of Louis Lorimier, deceased, conveyed the premises by quit-claim deed to the inhabitants of the town of Cape Girardeau "collectively for their use, benefit, and behoof forever".

The deed of September 11, 1820, conveyed certain other property not involved in this proceeding, and concluded with the following paragraph:

"Provided, always, that the several tracts or parcels of land thus granted to the town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any of them, shall never become private property."

The property sought to be condemned is included in said deed of September 11, 1820.

XXIV.

The property sought to be condemned by plaintiff in this proceeding as the site for the construction of a Post Office and Custom House Building at Cape Girardeau, Missouri, is located in the town (now city) of Cape Girardeau, Missouri, and is now and has been for many years continuously prior to the commencement of this proceeding devoted to public purposes.

XXV.

The property sought to be condemned in this proceeding is a portion of a public park upon which is located a Court House used by the Court of Common Pleas of Cape Girardeau County, a Public Library Building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the library building.

The park upon which these structures are located is and has been used for gatherings of the Boy Scouts, and gatherings of various other groups. It is also used as a place for recreation, and is furnished with settees. The library is a public one, used by the public generally. [fol. 877] The bandstand is not only used by the band in giving concerts, but is used for public speakings. The second story of the Court House is occupied by the Common Pleas Court, a judge's chambers, and a law library for the Court, the entire second floor being appropriated to

the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the city engineer, the mayor, the city council, the city attorney, and also the clerk of the Court of Common Pleas. There is a basement in this building used largely for a storage place. The files and records of the Court of Common Pleas are kept there. The Government seeks to condemn certain of the park property with the improvements thereon, except the Library building.

XXVI.

The Public Library building located on the property sought to be condemned, is now and has been for many years past, continuously maintained as a Public Library building in which said City of Cape Girardeau, Missouri now maintains, and for many years past has continuously maintained, a public library for the general public use, both as a public library and also additionally as a meeting place for civic organizations, such as garden clubs, rose socities, historic societies, and other civic and public gatherings.

The real estate on which the said Public Library building is located, together with all of the real estate adjacent to said Public Library building, is included in the description of the property sought to be condemned in this proceeding; the City of Cape Girardeau will be required to vacate said Public Library building situated on the said real estate sought to be acquired by the plaintiff in this proceeding, upon thirty days notice by the Government, and, upon such notice, to remove said library and Library building from the Government property within a reasonable time.

XXVII.

The defendant Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Marie Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in the body of plaintiff's (Second) Amended Petition in Condemnation.

[fol. 878]

XXVIII.

The defendant Iska W. Carmack, is an inhabitant, citizen, taxpayer, and owner of lots in and near said town

(now City) of Cape Girardeau, Missouri, and is now and has been for many years prior to the institution of this proceeding, the owner of lots located in the town (now city) of Cape Girardeau, Missouri, upon which she has paid taxes.

XXIX.

The property sought to be condemned in this proceeding is on a bluff approximately 40 feet above Spanish Street. The land sought to be condemned is fairly level, but there are steep slopes on the North, East and South. These slopes are attractively terraced and are provided with concrete steps. The property sought to be condemned does not include the terraces on the East and South, and does not extend as far North as the terraces. The property sought to be condemned does not have and would not have any entrance to said property from the South or North. Between Spanish Street on the East and the property sought to be condemned, is a series of terraces of approximately 55 or 60 steps from Spanish Street to the East side of the property sought to be condemned. The terraces are not included in the condemnation and are not usable as an approach nor entrance to the portions of the public park not included in this proceeding. The only entrance of the public to the portion of the park not included in this condemnation proceeding from Spanish Street would have to be made over the concrete steps and over Government property in order to reach the portion of the park not included in this condemnation, proceeding from Spanish Street on the East. There is no street on the North, and no entrance from the North to the property sought to be condemned, except a [welk-way] over the portion of the city park lying North of the portion of said property sought to be condemned in this proceeding. There is no way to go directly to or from the portion of the park lying North of the property sought to be condemned, and the portion of the park lying South of the property sought to be condemned, except over the property sought to be condemned in this pro- [fol. 879] ceeding. The only entrance by the public to the property sought to be condemned, will be a walkway of approximately 141 feet from Lorimier Street to the West side of the site of the proposed Post Office

building. This proposed new location is about two blocks East and South of the present Post Office, the approximate center of the business section. This new location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of future business expansion or growth. A new building here would face a side street with only fair residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it would then be necessary to forego advantages with respect to the necessary approaches and driveways.

The said M. J. Deutsch, in his official report to the Administrator of the Federal Works Agency, in recommending the property sought to be condemned as the second choice for the site of the new Post Office and Custom House building at Cape Girardeau, said

"For Second Choice I have selected Site No. 1, the city-owned park, which could be developed into an attractive setting for the new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. The bid submitted by the City is not intended to be a final offer, and it is expected that after a review of the facts by the Site Committee a counter-offer could be made with respect to a definite area of about 175' x 215' within the park grounds and with respect to improvements in surrounding approaches, removal of trees and fountain, and demolition of present city building. The mayor and city council verbally agreed to favor any reasonable counter-offer to be made by the Government. It is my opinion that the government-owned site is valued at approximately $225 per front foot, whereas the park site has a value of about $100 per front foot, and this must be taken into consideration in submitting a counter-offer. The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly con- [fol. 880] demnation proceedings, as the city officials are willing and [desirour] for the trade".

[fol. 880] The said M. J. Deutsch, in his said report, in referring to the Northeast corner of Themi and Fountain Streets, said:

"There is considerable public sentiment in favor of the northeast corner of Themis and Fountain Streets, including the Greene corner and Bids 3, 7, and 9-A. This site would suit most of the business men as it would not change the status quo inasmuch as it would adjoin the present federal building."

According to the report of said M. J. Deutsch filed with the Administrator of the Federal Works Agency:

"This location adjoins the present federal building, close to what is regarded as the center of the business section and the most prominent corner in the town. If the city would take over the present federal building for a city hall and city court house, a new building on this site would create a civic center in this vicinity. This corner has considerable public sentiment in its favor, particularly because it would maintain the status quo with regard to proximity to the three business districts."

According to the report of said M. J. Deutsch, the Government's only Site Agent: Condemnation would appear to be necessary to secure the Greene property.

XXX.

That the property sought to be condemned by this action is to be acquired for public use but that such contemplated public use is not a use of the character contemplated and for which the property was conveyed and appropriated by the deed of September 11, 1820.

XXXI.

That the public use to which the plaintiff seeks to condemn the property is not superior in rank in respect to public necessity to the [public necessity to the] public use now being made of the property described in the Second Amended Petition.

[fol. 881]

XXXII.

The site described in the Second Amended Petition is not the only available property, reasonably fitted for the

public project described in the Second Amended Petition; there is other property available to the plaintiff better fitted for the public project than the property described in the Second Amended Petition.

XXXIII.

That failure to secure the site described in the Second Amended Petition will not result in failure or destruction of a public project.

XXXIV.

That the necessity for acquiring the site for a new Post Office and Court House does not imply necessity for taking the site described in the Second Amended Petition, which is already devoted to a public purpose.

XXXV.

That to condemn the site described in the Second Amended Petition would result in destruction of the practical use of the public park of which said site is a part; would result in removal by wrecking the present Common Pleas Court Building; removal of public library building and the monument on the park site; that proceedings of the Cape Girardeau Court of Common Pleas would be interfered with; that transaction of the city business in the Common Pleas Court house building would be interfered with; that transaction of the Probate Court business for the county of Cape Girardeau would be interfered with; that the use of the present library building would be interfered with.

[fol. 882] Declarations Of Law.

I.

Defendant, Iska W. Carmack, has an interest in the property sought to be condemned of a character which will permit her to assert the defenses set forth by her in answer filed in this case.

II.

Under the terms of the deed of dedication from the Lorimier heirs of September 11, 1820, neither the City of Cape Girardeau nor its officials have power to exchange, or to contract to exchange or convey the premises, de-

scribed in the Second Amended petition, to the plaintiff for the purpose described in said petition, and any agreement for the exchange of the property sought to be condemned for such purposes is void.

III.

The City of Cape Girardeau has no right, title, or interest in the property sought to be condemned, except the right, as trustee, under the deed of dedication, to manage that property for the uses and purposes to which it was devoted by the donors, and the use and purposes set forth in the Second amended Petition are not of the character described in the deed of dedication.

[fol. 883]

IV.

The ordinance attempting to authorize the contract to be entered into between the City of Cape Girardeau and the United States of America for the exchange of the property sought to be condemned in this proceeding for the site of the present Post Office and building in the City of Cape Girardeau, is not authorized by law.

V.

There is no express statutory authority or direction under which plaintiff can act to take the property described in the Second Amended Petition for the purposes therein described and plaintiff is without authority to condemn said land unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken.

VI.

The property described in the Second Amended Petition has been devoted to a public use because the owners were required by the deed of dedication so to do, and the city of Cape Girardeau, through its officials, are under a legal obligation to maintain the property for the purposes designated in the deed of dedication.

VII.

The public use to which the property described in the Second Amended Petition is now dedicated does not exempt the property from condemnation for another public

use which may be exercised consistent with the present public use or which is of superior rank in respect to public necessity to the present public use.

VIII.

There is no necessity for taking the land described in the Second Amended Petition, for the use therein described; there is other land better fitted for the proposed project, now available, and failure to secure the land sought will not result in failure of the project; the taking of this land would result in interference with its present public use; there is no necessity by implication for the taking of the land described in the Second Amended Petition for the purposes therein referred to.

[fol. 884] IX.

The action of the Postmaster General and the Administrator of Federal Works Agency in selecting the site described in the Second Amended Petition for the purposes therein referred to, under all the facts in this case, was arbitrary, capricious and unnecessary.

X.

Under the law, the pleadings and the evidence the plaintiff is not entitled to decree of condemnation and the findings and decree of the Court will be in favor of the defendant, Iska W. Carmack, and against the plaintiff.

Order.

Plaintiff's petition is dismissed. Decree in accordance herewith will be presented.

RUBEY M. HULEN,
Judge.

[fol. 885] (Decree.)

(Filed in U. S. District Court on June 1, 1944.)

On the 18th day of April, 1944, this cause came on to be heard, and then came the plaintiff, the United States of America, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern District of Missouri, and M. Walker Cooper, Special Assistant to the United States Attorney, and came also the defendant, Iska W. Carmack

by her atorneys L. Lee Bowman, Homer Hall, and I. R. Kelso, and plaintiff presented its duly verified (Second) Amended Petition for the condemnation and acquisition by the plaintiff of certain lands therein described, alleging that defendant, the City of Cape Girardeau, Missouri, a municipal corporation, is the apparent record owner of the fee simple title in and to said real estate, and that the other defendants named in said (Second) Amended Petition are the owners of, or claim or may claim an interest or interests in and to said real estate, and offered its evidence in support of said (Second) Amended Petition;

And the said defendant, Iska W. Carmack, by her attorneys presented her Answer to plaintiff's said (Second) Amended Petition, and offered her evidence in support of her said Answer and in opposition to plaintiff's said (Second) Amended Petition;

And said proceedings continuing from the 18th to the 19th day of April, 1944, and being completed on the said 19th day of April, 1944, the case was submitted and taken under advisement by the Court until this time; and now the Court having been fully advised in the premises, and having made and filed its written Memorandum Opinion, Findings of Fact, Conclusions of Law and Order, does now find, order, and adjudge, as follows:

[fol. 886] That plaintiff's (Second) Amended Petition is in due form and duly verified and is for the acquiring by condemnation and in fee simple absolute by the plaintiff of certain lands therein described, alleging that the defendant, the City of Cape Girardeau, Missouri, a municipal corporation, is the apparent record owner of the fee simple title in and to said real estate, and that the other defendants named in said (Second) Amended Petition are the owners of, or claim or may claim an interest or interests in and to said real estate, for use as a site for the construction and erection of a United States Post Office and Custom House in the City of Cape Girardeau, in the County of Cape Girardeau, State of Missouri, pursuant to the authority contained in the following Acts of Congress:

The Third Deficiency Appropriation Act, Fiscal Year 1937, approved August 25, 1937, 50 Stat. 773; the Federal Public Buildings Appropriation Act of 1938, approved

June 21, 1938, 52 Stat. 818, appropriation title "80 x 1006.-4212 Construction of Public Buildings, Public Buildings Administration, Act August 25, 1937"; and the Reorganization Act of 1939, in accordance with the provisions of which Plan Numbered I was submitted to the Congress on April 25, 1939, by Joint Resolution approved June 7, 1939 (Public Resolution No. 20—76th Congress) authorizing the acquisition when necessary, by purchase, condemnation exchange or otherwise of sites and additional land for emergency construction of public building projects outside the District of Columbia; and pursuant to the authority contained in the Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, Sec. 257) and Act of February 26, 1931, 46 Stat. 1421 (U. S. C. Title 40, Secs. 258 (a) to 258 (e);

And the defendants and each of them came not but made default, except the defendant Iska W. Carmack, who appeared in person and by her attorneys L. Lee Bowman, Homer Hall and I. R. Kelso, and filed her separate Answer to plaintiff's (Second) Amended Petition in Condemna-[fol. 887] tion for herself and others similariy situated, and offered her testimony in support of her Answer and in opposition to plaintiff's (Second) Amended Petition.

And the Court finds that all the defendants in this case have been notified according to law of the pendency of the petition herein by personal service of the summons and notice or by an Order of Publication had herein and duly published for three consecutive weeks in the Cape Girardeau News, a weekly newspaper printed and published in the City of Cape Girardeau in the County of Cape Girarrdeau in the State of Missouri, prior to the 5th day of February, 1942, and that this Court and the judge thereof has full and complete jurisdiction over the subject matter of the petition and over each and all of the defendants named and described in said petition.

And the Court further finds that the land described in plaintiff's (Second) Amended Petition sought to be condemned in this proceeding for the site of a new Post Office and Custom House in the City of Cape Girardeau, Missouri, is located at and within the City of Cape Girardeau, Missouri, in the county of Cape Girardeau, State of

Missouri, and being in the Southeastern Division of the Eastern Judicial District of the State of Missouri, and within the jurisdiction of this Court, which land is more particularly described as follows:

Lying and being in Cape Girardeau, County of Cape Girardeau, State of Missouri:

Beginning at a point in the easterly line of Lorimier Street which point is distant 100 feet northwardly from the intersection of the easterly line of Lorimier Street with [fol. 888] the center line of Themis Street extended eastwardly; running thence South 82 degrees 59 minutes East, on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point; thence south 6 degrees 58 minutes West on a line parallel with the easterly line of Lorimier Street a distance of 280 feet to a point; thence North 82 degrees 59 minutes West on a line parallel with the center line of Themis Street extended, a distance of 240 feet to a point in the easterly line of Lorimier Street; thence North 6 degrees 58 minutes East along the Easterly line of Lorimier Street a distance of 280 feet to the point or place of beginning; together with the improvements thereon except the Library Building.

The Court further finds that defendant, Iska W. Carmack, has sustained the burden of proof placed upon her; that the selection of the land described in plaintiff's said (Second) Amended Petition for a public use as a site for the construction and erection of a United States Post Office and Custom House Building in the City of Cape Girardeau, County of Cape Girardeau, and State of Missouri, under all the circumstances, conditions, and facts shown by the evidence in this proceeding, amounts in law to an arbitrary and unnecessary act; that under the admitted and undisputed facts in this case the United States of America has no right as a matter of law to acquire by condemnation, exchange, or otherwise, the [propety] sought to be condemned in this proceeding, for a public use as a site for the construction and erection of a new United States Post Office and Custom House Building in the [fol. 889] City of Cape Girardeau, County of Cape Girardeau, and State of Missouri.

And the Court further finds the issues in favor of the defendant, Iska W. Carmack, and against the plaintiff, the United States of America, and that plaintiff's said (Second) Amended Petition should be dismissed.

And it is therefore ordered and adjudged that plaintiff's (Second) Amended Petition filed in this proceeding with leave of Court be and it is dismissed.

Dated this 1 day of June, 1944.

RUBEY M. HULEN,
United States District Judge.

[fol. 890] (Motion of Plaintiff for New Trial.)

(Filed in U. S. District Court on May 23, 1944.)

Now comes the plaintiff, the United States of America, by its attorneys, Harry C. Blanton, United States Attorney, and M. Walker Cooper, Special Assistant United States Attorney, and moves the Court to modify its Findings of Fact and Conclusions of Law, to set aside its Memorandum Opinion and the Judgment and Decree entered thereon and to grant the plaintiff a new trial therein for the following reasons, viz:

(1) The Court erred in its findings as to No. XIII of its Findings of Fact, reading as follows:

"The Joint Committee would not have recommended the park site described in the amended petition if they had known, prior to taking such action, the city of Cape Girardeau was without power to legally transfer or exchange the park property to the Government for the present Federal Building site.";

(2) The Court erred in its finding as to No. XIV of its Findings of Fact, reading as follows:

"Prior to making the selection of the site described in the petition the Joint Committee relied upon and thereafter acted upon the representations of the city officials of the city of Cape Girardeau that they had a legal right to sell or exchange the park site, described in the amended petition, for the present Federal Building site.";

[fol. 891] (3) The Court erred in its finding as to No. XV of its Findings of Fact, reading as follows:

"Prior to the institution of this proceeding on November 22, 1941, the Administrator of Federal Works Agency did not act jointly with the Postmaster General in the selection of the site for the construction of the proposed Post Office and Court House in Cape Girardeau.";

(4) The Court erred in its finding as to No. XIX of its Findings of Fact, reading as follows:

"That after the order of this District Court was reversed by the Circuit Court of Appeals, on the 26th day of April, 1943, a joint selection of the property involved in this suit as the New Post Office and Court House site in the City of Cape Girardeau was made by the Postmaster General and the Administrator of the Federal Works Agency upon the recommendation of the Fourth Assistant Postmaster General, Walter Myers and L. A. Simon acting for W. E. Reynolds, Commissioner of Public Buildings Administration of the Federal Works Agency, who were theretofore designated to act in that capacity by their respective superiors or by law.";

(5) The Court erred in its finding as to No. XX of its Findings of Fact, reading as follows:

"That the action of the Postmaster General and Administrator [or] Federal Works Agency, referred to in the preceding paragraph, would not have been taken but for the recommendation of the Joint Committee consisting of the Fourth Assistant Postmaster General and the Commissioner of Public Buildings Administration; that the joint selection referred to in the preceding paragraph was pre-
[fol. 892] pared for the signatures of the [of the] Postmaster General and Administrator of Federal Works Agency and they signed same without any independent knowledge of the circumstances or facts upon which said selection was based and wholly and solely upon the recommendation of the Joint Committee, consisting of the Fourth Assistant Postmaster General and Commissioner of Public Buildings Administration, and the Fourth Assistant Postmaster General and Commissioner of Public Buildings Administration would not have made said recommendation,

which was so acted upon, but for the representations that had been made to them by the officials of the city of Cape Girardeau that they, the officials of the city of Cape Girardeau, had a legal right to sell or exchange the park site for the present Federal Building site in Cape Girardeau, and that said representation was relied upon and acted upon by said Fourth Assistant Postmaster General and Commissioner of Public Buildings Administration.";

(6) The Court erred in its finding as to No. XXX of its Findings of Fact, reading as follows:

That the property sought to be condemned by this action is to be acquired for public use but that such contemplated public use is not a use of the character contemplated and for which the property was conveyed and appropriated by the deed of September 11, 1920.";

(7) The Court erred in its findings as to No. XXXI of its Findings of Fact, reading as follows:

"That the public use to which the plaintiff seeks to condemn the property is not superior in rank in respect to [fol. 893] public necessity to the public use now being made of the property described in the Second Amended Petition.";

(8) The Court erred in its findings as to No. XXXII of its Findings of Fact, reading as follows:

"The site described in the Second Amended Petition is not the only available property, reasonably fitted for the public project described in the Second Amended Petition; there is other property available to the plaintiff better fitted for the public project than the property described in the Second Amended Petition.";

(9) The Court erred in its finding as to No. XXXIII of its Findings of Fact, reading as follows:

"That failure to secure the site described in the Second Amended Petition will not result in failure or destruction of a public project.";

(10) The Court erred in its finding as to No. XXXIV of its Findings of Fact, reading as follows:

"That the necessity for acquiring the site for a new Post Office and Court House does not imply necessity for taking the site described in the Second Amended Petition, which is the site described in the Second Amended Petition, which is already devoted to a public purpose.";

(11) The Court erred in its finding as to No. XXXV of its Finding of Fact, reading as follows:

"That to condemn the site described in the Second Amended Petition would result in destruction of the practical use of the public park of which said site is a part; would result in removal by wrecking the present Common Pleas Court building; removal of public library buildings and the monument on the park site; that proceedings of the Cape Girardeau Court of Common Pleas would be interfered with; that transaction of the city business in the [fol. 894] Common Pleas Court house building would be interfered with; that transaction of the Probate Court business for the county of Cape Girardeau would be interfered with; that the use of the present library building would be interfered with.";

(12) The Court erred in its finding as to No. III of its Declaration of Law, reading as follows:

"The City of Cape Girardeau has no right, title, or interest in the property sought to be condemned, except the right, as trustee, under the deed of dedication, to manage that property for the uses and purposes to which it was devoted by the doners, and the use and purposes set forth in the Second Amended Petition are not of the character described in the deed of dedication.";

(13) The Court erred in its finding as to No. IV of its Declaration of Law, reading as follows:

"The ordinance attempting to authorize the contract to be entered into between the City of Cape Girardeau and the United States of America for the exchange of the property sought to be condemned in this proceeding for the site of the present Post Office and building in the City of Cape Girardeau, is not authorized by law.";

(14) The Court erred in its finding as to No. V of its Declarations of Law, reading as follows:

"There is no express statutory authority or direction under which plaintiff can act to take the property described in the Second Amended Petition for the purpose therein described and plaintiff is without authority to condemn said land unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken.";

[fol. 895] (15) The Court erred in its finding as to No. VI of its Declarations of Law, reading as follows:

"The property described in the Second Amended Petition has been devoted to a public use because the owners were required by the deed of dedication so to do, and the city of Cape Girardeau, through its officials, are under a legal obligation to maintain the property for the purposes designated in the deed of dedication.";

(16) The Court erred in its finding as to No. VII of its Declaration of Law, reading as follows:

"The public use to which the property described in the Second Amended Petition is now dedicated does not exempt the property from condemnation for another public use which may be exercised consistent with the present public use or which is of superior rank in respect to public necessity to the present public use.";

(17) The Court erred in its findings as to No. VIII of its Declaration of Law, reading as follows:

"There is no necessity for taking the land described in the Second Amended Petition, for the use therein described; there is other land better fitted for the proposed project, now available, and failure to secure the land sought will not result in failure of the project; the taking of this land would result in interference with its present public use; there is no necessity by implication for the taking of the land described in the Second Amended Petition for the purposes therein referred to.";

[fol. 896] (18) The Court erred in its finding as to No. IX of its Declarations of Law, reading as follows:

"The action of the Postmaster General and the Administrator of Federal Works Agency in selecting the site

described in the Second Amended Petition for the purposes therein referred to, under all the facts in this case, was, arbitrary, capricious and unnecessary.";

(19) The Court erred in its findings as to No. X of its Declaration of Law, reading as follows:

"Under the law, the pleadings and the evidence the plaintiff is not entitled to decree of condemnation and the findings and decree of the Court will be in favor of the defendant, Iska W. Carmack, and against the plaintiff.";

(20) The Court erred in finding XXIX of its Findings of Fact as follows:

"The only entrance by the public to the property sought to be condemned, will be a walkway of approximately 141 feet from Lorimier Street to the West side of the site of the proposed Post Office Building"

all of the testimony tending to show that the whole of the West side of the property sought to be condemned is adjacent to and abutting upon the East line of Lorimier Street;

(21) The Court erred in holding that the term "arbitrarily and capriciously", [ad] applied to the joint action of the Postmaster General and the Administrator of the Federal Works Agency, in the selection of the site, is synonymous, with a lack of necessity for taking the particular property described in the petition and that proof that there was no necessity for the taking of the particular property described in the petition, to the satisfaction of this court, was sufficient proof or arbitrary and capricious action by the Postmaster General and the Administrator of the Federal Works Agency in the joint selection of the site in controversy here;

[fol. 897] (22) The Court erred in treating the trial of this case as a trial de novo upon appeal from the joint action of the Postmaster General and the Administrator of the Federal Works Agency in the selection of the site in controversy here, upon the issue of the availability and the suitability of the site for the new Post Office and Custom House;

(23) The Court erred in the holding that the failure of the Joint Committee to follow the recommendations of M. J. Deutsch, Post Office Inspector and Site Agent, in the selection of the Post Office and Custom House site and that the joint selection of the Post Office and Custom House site by the Postmaster General and the Administrator of the Federal Works Agency upon the recommendation of the Joint Committee contrary to the recommendation of the said M. J. Deutsch, was arbitrary and capricious;

(24) The Court erred in holding, by inference, that in the selection of the New Post Office and Custom House site, the Joint Committee and the Postmaster General and the Administrator of the Federal Works Agency were bound by the recommendations of M. J. Deutsch Post Office Inspector and Site Agent, and that the refusal of the said Joint Committee and the said Postmaster General and Administrator of the Federal Works Agency to follow said recommendations amount to arbitrary and capricious action upon the part of the Postmaster General and the Administrator of the Federal Works Agency in the joint selection of said site;

(25) The Court erred in refusing to include in his Findings of Fact suggested by the plaintiff and numbered 6, 7, 8, 12, 14, 15, 20, 21, 22, 23, and 24;

(26) The Court erred in his Findings of Fact by modifying therein Findings of Fact suggested by the plaintiff and numbered 9, 10, 11, 13, 16, 17, 18 and 19, and by modifying such suggested Findings of Fact by not including all of such numbered suggested Findings of Fact, or by adding additional Findings of Fact thereto;

[fol. 898] (27) The Court erred in failing to include in his Conclusions of Law the Conclusions of Law suggested by the plaintiff and numbered 1, 2, 3, 4, 5 and 6;

(28) The Judgment and Decree of the court in this case is against the law, against the evidence, against the law under the evidence and against the evidence under the law;

Wherefore, plaintiff moves the Court to grant it a new trial in this case.

HARRY C. BLANTON,
United States Attorney.

[redacted] WALKER COOPER,
Special Assistant United States Attorney.

[fol. 899] (Order Overruling Motion of Plaintiff for New Trial.)

1944

June 1º Motion of plaintiff for New Trial submitted and overruled.

[fol. 900] Statement of Points on Which Appellant Intends to Rely on Appeal.

(Filed in U. S. District Court on September 18, 1944.)

Now comes the United States of America, the plaintiff and the appellant in this cause and states that the points on which the appellant intends to rely on the appeal to the United States Circuit Court of Appeals for the Eighth Circuit are as follows:

(1) The Court erred in dismissing the Government's petition for condemnation on the ground that the selection of the particular property involved as the site for a new Post Office and Custom House Building would not have been made if the administrative officers had known that the City of Cape Girardeau lacked the authority to convey;

(2) The Court erred in holding that the Act of Congress authorizing the acquisition by condemnation of sites for Post Offices and Custom Houses does not authorize [fol. 901] the taking by condemnation of property already devoted to public uses by the State or its sub-divisions, unless a proposed site is the only available property, reasonably fitted for the public use, and the failure to secure such site will result in the failure of the project;

(3) The Court erred in substituting the Court's judgment and opinion for that of the acquiring agency as to the selection of a site for the new Post Office and Custom House Building from the sites that were available and which the Court considered to be reasonably fitted for such use.

(4) The Court erred in construing the phrase "arbitrary and capricious" to mean "unnecessary."

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 16th day of September, 1944.

[fol. 902] Docket entries beginning with docket entry showing the filing of Amended Petition on August 14, 1943, and including all subsequent entries.

[fol. 903]

1943

Aug. 14 Motion of Plaintiff for leave to file amended petition filed. Order granting leave to file amended petition received, filed and entered. Amended petition filed.

Aug. 26 Disclaimer of Cape Girardeau County, Mo., filed.

Sept. 10 Motion of Plaintiff for leave to amend amended petition filed. Order granting Plaintiff leave to amend the amended petition filed herein on August 14, 1943, received, filed and entered.

Oct. 5 Motion of Defendant, Iska W. Carmack, to strike out the amended petition in condemnation filed in the above entitled cause on August 13, 1943, received and filed.

Oct. 7 Demurrer to Plaintiff's second amended petition filed by Defendant, Iska W. Carmack.

Oct. 11 Demurrer of Defendant, Iska W. Carmack, to Plaintiff's second amended petition continued to December 14, 1943.

Oct. 18 Order filed and entered continuing cause to December 14, 1943.

Nov. 29 One lot of depositions of witnesses taken before Joseph M. Hall and Howard B. Smith, Shorthand Reporters of Washington, D. C. on behalf of Defendant, Iska W. Carmack, received and filed. Supplemental return of Joseph M. Hall and Howard B. Smith, Shorthand Reporters of depositions including certain documents, exhibits, papers, etc., received and filed.

Dec. 13 Depositions taken on behalf of respective parties heretofore filed by the Clerk on motion of U. S. Attorney ordered published. Cause reset for February 8, 1944. Defendant granted to and including Jan. 15, 1944 within which to file briefs in support of motions to strike out amended petition, demurrer, etc. Reply brief of Plaintiff to be filed on or before Feb. 1, 1944.

1944

Jan. 21 Motion of Plaintiff for a determination of the matters to be considered upon the submission to the Court of the Defendant, Iska W. Carmack's motion to strike out Plaintiff's amended petition and of Defendant, Iska W. Carmack's demurrer to Plaintiff's (second) amended petition filed.

Jan. 31 Motion of Plaintiff for a determination of the matters to be considered upon the submission to the Court of the Defendant, Iska W. Carmack's motion to strike out Plaintiff's amended petition and of Defendant, Iska W. Carmack's demurrer to Plaintiff's (second) amended petition argued and submitted to Hon. Rubey M. Hulen, at St. Louis by agreement of respective parties and sustained, the Court announcing that it would consider the motions and pleadings under the record as now made; that either party will have

the right to offer further matters pertinent to the question on February 8, 1944.

[fol. 904]

Feb. 8 Demurrer of Defendant, Iska W. Carmack, to Plaintiff's second amended petition overruled. Further hearing on motion of Defendant, Iska W. Carmack to strike out Plaintiff's second amended petition resumed, concluded and submitted and overruled. Answer of Defendant, Iska W. Carmack, to Plaintiff's second amended petition filed by leave. Cause continued to April 19, 1944.

Apr. 18 Final hearing before the Court on the issues raised by the pleadings of respective parties begun and concluded. At the close of Plaintiff's evidence in chief the Defendant, Iska W. Carmack, files and submits her motion praying the Court to rule that under the pleadings and evidence that Plaintiff is not entitled to recover and findings must be for the Defendant, which motion is by the Court overruled. Introduction of evidence in behalf of Defendant Carmack begun but not being concluded at the hour of adjournment further proceedings postponed until tomorrow at 9:30 A. M.

Apr. 19 Final hearing before the Court on issues raised by the pleadings of respective parties resumed and the introduction of evidence on behalf of Defendant, Iska W. Carmack, resumed and concluded. Introduction of evidence on behalf of Plaintiff in rebuttal begun and concluded, and cause submitted. Subject to the right of either party to offer additional evidence if so advised. Demurrer of Defendant, Iska W. Carmack, presented and filed. Plaintiff granted 5 days within which to submit suggested Findings of Fact and Conclusions of Law. Defendant granted 5 days within which to submit suggested Findings of Fact and Conclusions of Law.

May 6 Submission of cause vacated; by consent introduction of additional evidence on behalf of respective parties begun and concluded and cause argued and finally submitted at St. Louis, this day.

May 19 Joint memorandum opinion, findings of fact, conclusions of law and order of Judge Rubey M. Hulen received and filed. Issues found in favor of Defendant, Iska W. Carmack, and against the Plaintiff; Plaintiff's petition dismissed and directing that a decree in accordance with such memorandum opinion, findings of fact and conclusions of law and order be submitted for allowance, signature and entry. Requested findings of fact, conclusions of law as submitted by the respective parties marked A, B and C with notations thereon "Given" or "Refused" received and filed.

May 23 Motion of Plaintiff for a new trial filed.

June 1 Decree dismissing Plaintiff's (second) amended petition finding issues in favor of Defendant, Iska W. Carmack and against Plaintiff received, filed and entered.

June 19 Motion of Plaintiff for new trial submitted and overruled.

Aug. 21 Plaintiff's notice of appeal to U. S. Circuit Court of Appeals, Eighth Circuit from the final judgment or decree dismissing Plaintiff's petition entered on the first day of June, 1944, upon trial of issues raised by Plaintiff's (second) amended petition and the answer of Defendant, Iska W. Carmack filed and copies of same this day mailed to Messrs. I. R. Kelso, L. L. Bowman and Homer Hall, Attorneys for Defendants.

[fol. 905]

Sept. 18 Plaintiff's designation of the record on appeal together with statement of Points on which appellant intends to rely on appeal to the U. S. Circuit Court of Appeals, Eighth Circuit filed.

Transcript of testimony and proceedings in trial of cause filed in duplicate by Plaintiff.

Sept. 26 Appellee's counter designation of additional portions of the record, proceedings and evidence to be included in the record on appeal, together with notice to Harry C. Blanton, U. S. Attorney, and M. Walker Cooper, Special Assistant, U. S. Attorney, Attorney's for Plaintiff and affidavit as to service of same filed by defendant, and appellee, Iska W. Carmack.

Sept. 28 Marshal's return of service as to filing of Plaintiff's designation of the record on appeal and Statement of Points on which appellant U.S.A. intends to rely on appeal filed.

Sept. 28 Order extending time for filing the record on appeal and docketing the action on appeal to and including the 30th day of October, 1944, received, filed and entered.

[fol. 906] (Designation of Plaintiff of matters to be contained in Transcript on Appeal.)

(Filed in U. S. District Court on September 18, 1944.)

Now comes the United States of America, the plaintiff and the appellant in this cause, and designates the following to be incorporated in and to constitute the record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit:

1. Motion for leave to file amended petition dated August 12, 1943 and filed August 14, 1943.

2. Order for Leave to File Amended Petition dated August 12, 1943 and filed August 14, 1943.

3. Amended Petition in Condemnation filed August 14, 1943.

4. Motion for Leave to Amend Amended Petition dated September 9, 1943 and filed September 10, 1943.

5. Order Granting Leave to Amend Amended Petition dated September 9, 1943 and filed September 10, 1943.

6. Disclaimer of Cape Girardeau County, Missouri, filed August 26, 1943 by James A. Finch, Prosecuting Attorney

of Cape Girardeau County, Missouri and Attorney for Cape Girardeau County, Missouri.

[fol. 907] 7. Answer of Defendant, Iska W. Carmack, to Plaintiff's (Second) Amended Petition in Condemnation filed February 9, 1944.

8. The entire transcript of the testimony adduced and proceedings had at the trial including all exhibits except maps, plats and photographs.

9. Suggested Findings of Fact and Conclusions of Law submitted by plaintiff to the Court.

10. Suggested Findings of Fact submitted to the Court by the defendant Iska W. Carmack.

11. Suggested Conclusions of Law submitted to the Court by the defendant Iska W. Carmack.

12. Memorandum Opinion, Findings of Fact, Conclusions of Law and Order signed by Judge Rubey M. Hulen and filed May 19, 1944.

13. Decree Dismissing Plaintiff's Petition signed by Judge Rubey M. Hulen filed June 1, 1944.

14. Motion for New Trial filed by plaintiff May 23, 1944.

15. Minute Entry showing the Overruling of the Motion for New Trial filed by plaintiff, together with the date of said entry.

16. Notice of Appeal filed August 21, 1944.

17. Points to be Relied Upon on the Appeal.

18. Copy of this Designation.

[fol. 908] 19. A certified list of all of the docket entries in this case beginning with the docket entry showing the filing of the amended petition on August 14, 1943 and including all the subsequent docket entries.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant,
United States Attorney.

Dated this 16th day of September, 1944.

[fol. 909] Notice Of Iska W. Carmack, Appellee, Of Filing Of Counter Designation Of Additional Portions Of The Record, Proceedings And Evidence To Be Included In The Contents Of Record On Appeal.

To:

United States of America,
Appellant.

Harry C. Blanton
United States Attorney

M. Walker Cooper
Special Assistant
United States Attorney,
Attorneys For Appellant.

You, and each of you, are hereby notified that Iska W. Carmack, Appellee in the above entitled cause, will, on Wednesday, September 26, 1944, file in the office of the Clerk of the United St s District Court at Cape Girardeau, Missouri, the following:

1. Counter Designation by Iska W. Carmack, Appellee, of additional portions of the record, proceedings and evidence to be included in the record on appeal, copy of which [fol. 910] is attached hereto.

ISKA W. CARMACK,
Appellee.
By L. Lee Bowman,
Homer Hall,
I. R. Kelso,
Attorneys for Iska W. Carmack, Appellee.

[fol. 911] (Designation of Defendant Iska W. Carmack of Additional Matters to be contained in Transcript on Appeal.)

Now comes Iska W. Carmack, the defendant and the appellee in this cause, and designates additional portions

of the record proceedings and evidence to be included in and to constitute a portion of the record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, as follows:

1. Petition in Condemnation (as amended) filed November 22, 1941.

2. Answer of Defendant (Appellee), Iska W. Carmack, to the Plaintiff's Petition (as amended) filed February 16, 1942.

3. Amended Reply to Amended Answer of Iska W. Carmack filed by Plaintiff, United States of America, on February 16, 1942.

4. Intervening Petition of Grand Army of the Republic, et al,, filed February 26, 1942.

[fol. 912] 5. All maps and plats offered in evidence at the trial of this cause.

6. All photographs offered in evidence at the trial by Defendant (Appellee), Iska W. Carmack.

ISKA W. CARMACK,
Appellee,
By L. Lee Bowman,
Homer Hall,
I. R. Kelso,
Attorneys for Iska W. Carmack, Appellee.

[fol. 913] (Affidavit of Service.)

State Of Missouri,
County of Cape Girardeau—ss.:

L. L. Bowman, first being duly sworn, on his oath deposes and says that he is one of the attorneys for the appellee, Iska W. Carmack, in the above entitled cause, and affiant says that on this the 26th day of September, 1944, he served

a copy of the above and foregoing Counter Designation of Contents of Record on Appeal together with a copy of "Notice by Iska W. Carmack, Appellee, of filing of Counter-Designation of Additional Portions of the Record, Proceedings and Evidence to be Included in the Contents of Record on Appeal,"

on Harry C. Blanton, United States District Attorney for the Eastern District of Missouri, and M. Walker Cooper, Special Assistant to United States Attorney, addressed to New Federal Building, St. Louis, Missouri, attorneys for appellant, by mailing a true and correct copy of the above and foregoing Counter Designation of Contents of Record on Appeal, and copy of said Notice above set out, to said Harry C. Blanton and M. Walker Cooper by placing said Counter Designation of Contents of Record on Appeal in an envelope addressed as herein set forth, with proper [fol. 914] postage attached and depositing it in the United States mail in the Post Office at Cape Girardeau, Missouri.

L. LEE BOWMAN,
Affiant.

Subscribed and sworn to before me this 26th day of September, 1944.

JAMES J. O'CONNOR,
(Seal) Clerk U. S. District Court.

By James M. Arnold,
Deputy.

Endorsed: Filed Sept. 26, 1944, Jas. J. O'Connor, Clerk.

[fol. 915] (Clerk's Certificate to Transcript.)

United States of America,
Eastern District of Missouri,
Southeastern Division—ss.:

I, James J. O'Connor, Clerk of the United States District Court for the Eastern Judicial District of Missouri, South-

eastern Division, do hereby certify that the foregoing is a full true and complete transcript of the record, entries, proceedings, papers and files in the cause of United States of America, Plaintiff, vs. Certain Land Situate in the City of Cape Girardeau, County of Cape Girardeau, State of Missouri, and the City of Cape Girardeau, Missouri, a Municipal Corporation, Iska W. Carmack, et al., are defendants, No. 482 Civil, as fully as the same appears from the files and records in my office and as designated by Appellant and Appellee in their respective designations of the record on appeal in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Cape Girardeau, Missouri, this 23rd day of October, 1944.

Seal Of The
U. S. Dist.
Court
Southeastern Div.
East. Jud. Dist.
Of Missouri

JAMES J. O'CONNOR,
Clerk, U. S. District Court.

By James M. Arnold,
Deputy Clerk.

Filed Oct. 30, 1944, E. E. Koch, Clerk.

654 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. Harry C. Blanton, Mr. Walker Cooper, and Mr. Norman Littell as Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit

No. 12980

UNITED STATES OF AMERICA, APPELLANT

v.

ISKA W. CARMACK

The Clerk will enter my appearance as Counsel for the Appellant.

HARRY C. BLANTON,
U. S. Atty.,
WALKER COOPER,
Special Asst. to U. S. Atty.,
NORMAN LITTELL,
Asst. Atty. Genl.,
Washington, D. C.

[Endorsed]: Filed in U. S. Circuit Court of Appeals, Oct. 31, 1944.

(Appearance of Mr. J. Edward Williams, Mr. Vernon L. Wilkinson, and Mr. S. Billingsley Hill as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

J. EDWARD WILLIAMS,
Acting Head, Lands Division,
655 VERNON L. WILKINSON,
Attorney, Department of Justice,
S. BILLINGSLEY HILL,
Attorney, Department of Justice,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 11, 1944.

(Appearance of Mr. L. Lee Bowman as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

L. LEE BOWMAN,
217 H-H Bldg., Cape Girardeau, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 6, 1944.

(Appearance of Mr. Homer Hall as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

HOMER HALL.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 6, 1944.

656 (Appearance of Mr. Robert D. Abbott as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

ROBERT D. ABBOTT,
506 Olive St., St. Louis 1, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 6, 1944.

(Appearance of Mr. I. R. Kelso as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

I. R. KELSO,
First-Natl. Bank Bldg.,
Cape Girardeau, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 21, 1944.

657 *Order of Submission*

May Term, 1945

Thursday, May [illegible], 1945

This cause having been called for hearing in its regular order, argument was commenced by Mr. Harry C. Blanton, United States Attorney, for appellant, continued by Mr. L. Lee Bowman and concluded by Mr. Homer Hall for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and for the briefs of counsel filed herein.

658 United States Circuit Court of Appeals, Eighth Circuit

No. 12980

UNITED STATES OF AMERICA, APPELLANT

vs.

ISKA W. CARMACK, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Missouri

November 6, 1945.

Mr. Harry C. Blanton, United States Attorney (Mr. J. Edward Williams, Acting Head, Lands Division; Mr. M. Walker Cooper,

Special Assistant United States Attorney; and Messrs. Vernon L. Wilkinson and S. Billingsley Hill, Attorneys, Department of Justice, were with him on the brief), for Appellant.

Mr. L. Lee Bowman and Mr. Homer Hall (Mr. Robert D. Abbott and Mr. I. R. Kelso were with them on the brief) for Appellee.

Before GARDNER, JOHNSEN, and RIDDICK, Circuit Judges.

659 RIDDICK, Circuit Judge, delivered the opinion of the court.

On the first trial of this action, in which the United States seeks to condemn as a site for a proposed post-office, courthouse, and customhouse building that part of a public park in the City of Cape Girardeau, Missouri, on which are located a public library and a building housing the local court of common pleas, the offices of the City of Cape Girardeau and the court officials, there was a judgment in favor of the United States. We reversed for reasons not necessary to be restated on this appeal from a judgment against the United States on the second trial. Carmack v. United States, 135 F. 2d 196. In remanding the case on the first appeal for further proceedings in the District Court we said that, while the inherent power of the United States to take the lands in question could not be doubted, there was on the record then before us the question as to whether the United States had determined, by the General Acts of Congress under which the condemnation proceedings were prosecuted, to exercise that power in respect to the particular property sought to be condemned; and the further question, if the first should be answered in the affirmative, whether in carrying out the purpose of Congress the agents of the Government to whom the selection of land for the site of the proposed Federal building had been delegated by Congress had acted capriciously or arbitrarily. Carmack v. United States, supra, at pages 199–200. Both questions have been resolved against the United States. This appeal brings into question these rulings of the District Court. Since we conclude that the court's decision on the first question is correct under the facts in this case, we find it unnecessary to consider the second.

The question under consideration is stated in the Government's brief as follows:

660 "Whether the Acts of Congress authorizing and directing the Postmaster General and the Federal Works Administrator to select towns and sites for post offices, customhouses and courthouses empower those officials to select land already devoted by a city and county to public uses where other sites are available and failure to secure such lands will not result in failure of the federal purposes."

The precise question, however, for decision is whether, under the facts revealed by this record, Congress may be said to have

authorized the Postmaster General and the Federal Works Administrator to take the particular land sought to be condemned. The question is one of statutory interpretation within the competence of courts to decide. Carmack v. United States, supra, at page 200.

The land sought to be taken by the United States was conveyed to the inhabitants of the Town of Cape Girardeau, predecessor of the City of Cape Girardeau, in 1820 to be held forever by the grantees as a public park for the use and benefit of the inhabitants of the town and the owners of adjacent lots. The City of Cape Girardeau has no power to convey any part of the public park nor to devote it to any use other than that specified in the deed under which it has been held by the City and its predecessor for more than a century. Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, 940; Carmack v. United States, supra. That part of the park now sought to be condemned is occupied by the public library building of Cape Girardeau and by the local courthouse. The entire second floor of the courthouse is used by the court of common pleas, a court of record with jurisdiction in civil and criminal matters. The first floor is occupied by the offices of the City of Cape Girardeau, including the mayor, city engineer, city clerk, city council, and city attorney, and also by the clerk of the court of common pleas. The basement of the building is used largely for storage space for the files and records of the common pleas court. The library building is used as a meeting place for all local civic organizations. The property described in the Government's petition for condemnation is a tract measuring 280 x 240 feet near the center of the park.

The District Court found on substantial evidence that the taking by the Government of that part of the park sought to be condemned would result in the destruction of the use of the remainder of the tract as a park; would require the wrecking of the common pleas court building and the removal of the public library building and a public monument; and would materially interfere with the proceedings of the court of common pleas and with the transaction of city business in the courthouse building, and also with the plans for a civic center prepared by an expert employed by the local chamber of commerce for that purpose. The court also found that there was no necessity for the taking of the land described in the petition for condemnation; that other sites in the City of Cape Girardeau were available for the proposed Federal project; that the failure to secure the land in this proceeding would not result in the failure of the Federal project;

and that the park was not selected by the Federal Works Administrator and the Postmaster General as a site for the Federal building upon considerations of Federal necessity or advantage, but because of the erroneous belief of these Federal agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated.

We cannot say that any of these findings of fact by the
662 District Court are clearly erroneous. On the contrary, each of them was, in our opinion, required by the evidence. By this evidence it was shown that the United States owned a post-office, courthouse, and customhouse building in the City of Cape Girardeau, located on the most prominent corner of the city, opposite the leading hotels, convenient to the largest patrons of the post office, and nearer the center of free mail delivery in the City than any other available location. It further appears that adjoining the site on which the present Federal building stands are tracts of land which the United States may acquire by purchase or condemnation at reasonable cost, and which, together with the site presently owned by the United States, affords sufficient area for any necessary additions to the present building as well as for the construction of a new building. The site now owned by the United States, together with the adjoining available tracts, was selected by the only representative of the Post Office Department and the Federal Works Agency who made a study of the relative merits of available sites in Cape Girardeau as the most desirable from the standpoint of the United States.

The evidence also established that, prior to the institution of the condemnation proceeding, certain agents of the Public Works Administrator and officers of Cape Girardeau had conceived the idea of an exchange of the park property for the present Federal building and the land on which it is situated, and that negotiations between them to that end had culminated in the proposed agreement between them for the exchange of property. As stated above, this proposed agreement was the moving cause for the selection of the park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under
663 which it held the park property, the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. This exchange was to be consummated eventually by the acceptance by Cape Girardeau of the present

Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings. The facts set out above are sufficient, we think, to distinguish this case from C. M. Patten and Co. v. United States, 9 Cir., 61 F. 2d 920; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372, and like decisions.

The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in Oklahoma v. Atkinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. 2d 636, 639. For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, §§ 301–303, effective July 1, 1939, 53 Stat. 1246, 1427; 40 U. S. C. A., § 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise in the District of Columbia and in the several states sites and additions to sites, and cause to be constructed thereon adequate and suitable buildings for the accommodation of various departments of the Government. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States for postoffices, courthouses, and customhouses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its
664 political subdivisions for a governmental purpose of equal rank, but also held in trust for the specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions.

If the Act relied on by the United States should be held to confer upon the Public Works Administrator and the Postmaster General the power asserted in this case, it would subject the States and their political subdivisions to an interference with necessary local governmental functions at the decision of Federal administrative officials, with possible unfortunate and unnecessary conflicts between State and Federal authority. We find no basis in the Act relied on by the Government for attributing to Congress any such intent.

The judgment of the District Court is affirmed.

A true copy.

Attest:

_____,

Clerk, U. S. Circuit Court of Appeals,
Eighth Circuit.

665 *Judgment*

United States Circuit Court of Appeals, Eighth Circuit

No. 12980

November Term, 1945

Tuesday, November 6, 1945

UNITED STATES OF AMERICA, APPELLANT

v.

ISKA W. CARMACK

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either of the parties in this Court.

November 6, 1945.

666 *Clerk's Certificate*

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States of America was Appellant and Iska W. Carmack was Appellee, No. 12980, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the 26th day of November, A. D. 1945, a mandate was issued out of said Circuit Court of Appeals

in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 22nd day of January A. D. 1946.

[SEAL] (S) E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

667 Supreme Court of the United States

Order allowing certiorari

Filed April 22, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MR. Justice JACKSON took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY

No. [redacted] 40

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

ISKA W. CARMACK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 812

UNITED STATES OF AMERICA, PETITIONER

v.

ISKA W. CARMACK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case, on November 6, 1945, by the United States Circuit Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The first opinion of the circuit court of appeals is reported in 135 F. 2d 196. The memorandum opinion of the district court after remand (R. 600–618) is reported in 55 F. Supp. 555. The second opinion of the circuit court of appeals (R. 658) is reported in 151 F. 2d 881.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 6, 1945 (R. 665). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under a statute authorizing the Federal Works Administrator, acting jointly with the Postmaster General, to condemn for post offices such sites "as he may deem necessary," a petition to condemn property already devoted to public use may properly be dismissed on the grounds that, in the opinion of the court, the selected site is not necessary for the public project because other sites are available, condemnation of the selected site will interfere with local governmental functions, and the property is held in trust for the specific purpose to which the land is being devoted.

2. Whether, under the facts of this case and particularly in the light of the approval of local public officials and a majority of local voters, the selection as a site for a federal post office of property used for a city park and courthouse was arbitrary and capricious.

3. Whether a taxpayer, property owner, and heir of the grantor to the city of the property sought to be condemned, has standing to object to the taking when she has no property interest in the land.

STATUTE INVOLVED

Section 1 of the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 1427, 40 U. S. C. 341 provides, in part:

> To enable the Federal Works Administrator to provide suitable accommodations in the District of Columbia for the executive departments, and independent establishments of the Government not under any executive department, and for courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Federal Works Agency in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, and to cause to be constructed thereon, and upon lands belonging to the Government conveniently located and available for the purpose (but exclusive of military or naval reservations), adequate and suitable buildings for any of the foregoing purposes, giving preference, where he considers conditions justify such action, to cases where sites for public buildings have prior to May 25, 1926, been acquired or authorized to be acquired, and to enlarge, remodel, and extend existing public buildings under the

control of the Federal Works Agency, and to purchase buildings, if found to be adequate, adaptable, and suitable for the purposes of sections 341, 342, 343, 344, 345, 346 and 347 of this title, together with the sites thereof, and to remodel, enlarge, or extend such buildings and provide proper approaches and other necessary improvements to the sites thereof. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Federal Works Administrator to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quitclaim deed of conveyance: *Provided,* That in carrying into effect the provisions of sections 341, 342, 343, 344, 345, 346, and 347 of this title, insofar as relates to buildings to be used in whole or in part for postoffice purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: *Provided further,* That all sketches, plans, and estimates for buildings shall be approved by the Federal Works Administrator and the heads of the

executive departments which are to be located in such building.

The Federal Works Administrator is authorized to carry on the construction work herein authorized by contract, or otherwise, as he deems most advantageous to the United States.

* * * * *

STATEMENT

This is a proceeding brought by the United States to condemn land as a site for a United States Post Office, Customhouse, and Court building in the City of Cape Girardeau, Missouri. The site is a section of a city park on which are located a courthouse used by the Court of Common Pleas of Cape Girardeau County, a city library, a bandstand, and two memorial monuments. The petition, filed on November 22, 1941, sought condemnation of the land and all improvements thereon except the library building. (R. 5, 2.) The City and County of Cape Girardeau, the heirs of the donor of the park property and all others who might claim interest in the property were named defendants (R. 2–3). Mrs. Carmack, an heir of the donor of the park property, a taxpayer and a property owner in the City, was the only defendant to contest the petition. Her ancestor had, in 1820, quitclaimed the property to the inhabitants of the Town of Cape Girardeau forever with a proviso that the land should be appropriated for

public uses and should not become private property (R. 625, 107). The district court found that Mrs. Carmack did not have sufficient interest to maintain her defenses and entered a preliminary decree of condemnation on March 5, 1942.

Upon appeal by Mrs. Carmack, the decree was reversed. *Carmack* v. *United States*, 135 F. 2d 196. The court held that, conceding that Mrs. Carmack had no such interest as would entitle her to participate in compensation payable for the property, "she would seem to have more than the general interest of a nonproperty-owning inhabitant" and was entitled to urge her defenses. 135 F. 2d at 199. The court then held that Mrs. Carmack was entitled to be heard on the question of whether the Government had acted arbitrarily in selection of this property. The decree was reversed on the additional ground that the petition did not allege nor did the evidence show that the Federal Works Administrator and the Postmaster General had acted jointly in selecting the site.

After remand, on June 10, 1943, Postmaster General Frank C. Walker and Federal Works Administrator Philip B. Fleming, acting jointly, made a formal selection of this site (R. 86–87). Thereafter, a petition for condemnation, amended to allege the joint selection, was filed on August 14, 1943 (R. 27). Again all defendants defaulted except Mrs. Carmack who answered, denying the authority of the United States to condemn the

property and alleging that the selection was made arbitrarily and capriciously (R. 39–55, 634). A hearing was had on this question in April 1944 (R. 55). The United States presented documentary and oral evidence of the matters leading to the recommendation of this site by the Joint Committee, consisting of the Fourth Assistant Postmaster General and the Commissioner of Public Buildings of the Federal Works Agency, and the selection by the Postmaster General and Federal Works Administrator. Mrs. Carmack presented evidence to show that the choice of this site was unnecessary and not to the best interests of the city. Figuring prominently in the evidence of both parties was a proposal by the City of Cape Girardeau, which the United States accepted, to exchange the property involved in these proceedings for the present federal building (R. 63–76, 421–433). It appears that local governmental officials were strongly in favor of this exchange and that, at a special election, a majority of the voters had favored it (R. 18–21, 63–76, 92–93, 162–165, 175–176, 349–350, 417–434, 509, 620). The evidence also showed that the relative advantages and disadvantages of some twenty-two proposals were considered before the site was selected (R. 122, 145–146). Mrs. Carmack contended that the city lacked authority to convey this property (see *supra*, pp. 5–6), that, therefore, the agreement was illegal, and that condemnation by

the United States of the city property should not be permitted as a means of effecting an illegal agreement (R. 46–47).

On May 19, 1944, the district court filed its findings of fact, conclusions of law and a memorandum opinion wherein it ruled, in Mrs. Carmack's favor, and a decree dismissing the amended petition was thereafter entered (R. 632–636). The district court found that the public use for which the Government sought to acquire the property was not "superior in rank" to the existing use, that there was other property available better fitted for the Government's project, that failure to secure the site would not result in failure of the Government project, and that condemnation of the site involved would interfere with local governmental functions (R. 629–630). It concluded that the City officials had no power to exchange the property, that there was no necessity for taking the site in question and that the selection of the site by the Federal Works Administrator and the Postmaster General was "arbitrary, capricious and unnecessary" (R. 631–632).

The circuit court of appeals affirmed on the ground that statutory authority did not exist for the condemnation of property already devoted to a public use under the circumstances described, stating that it did not consider the question whether the selection was arbitrary or capricious (R. 659).

SPECIFICATION OF ERRORS TO BE URGED

The courts below erred:

1. In holding that the Federal Works Administrator and the Postmaster General lacked authority to condemn the lands in question.

2. In holding, in effect, that the question of necessity for the taking of the lands is a judicial question.

3. In holding that the court can review the good faith determination of the Federal Works Administrator and the Postmaster General as to the necessity for the taking.

4. In passing upon the authority of the City officials to exchange the property when that question was not in issue.

5. In construing the phrase arbitrary and capricious to mean unnecessary in the opinion of the court.

6. In holding that the authority to condemn land devoted to public use is more limited than that to condemn private property.

7. In holding that Iska Carmack had standing to contest the condemnation petition.

8. In dismissing the Government's petition in condemnation.

REASONS FOR GRANTING THE WRIT

1. The court below purported to rest its decision upon a construction of the statute relied upon for the taking, and it concluded that under this statute the administrative officers had no author-

ity to take the particular land involved. The Act of May 25, 1926, c. 380, sec. 1, 40 U. S. C. 341, authorizes the Federal Works Administrator to acquire by purchase or condemnation for post offices and other buildings "such sites and additions to sites as he may deem necessary", provided that the Federal Works Administrator and the Postmaster General act jointly in the selection of sites to be used for post offices. No limitation is placed upon the sites that may be selected for post offices nor is there anything in the legislative history of the Act to justify insertion of any restriction. Thus, the conclusion of the circuit court of appeals that the officers had no authority to select this particular site cannot be supported by reference to the legislative purpose, either as evidenced by the plain words of the statute or by other legislative material.

The decision of the court below is based upon findings of the trial court to the effect that there was no necessity for taking these lands because other sites were available for the post office, that the land was already being used for a governmental purpose of equal rank, that the taking would interfere with local governmental functions, that the land was held in trust for the specific purpose to which it was being devoted, and that the failure to secure this land would not result in failure of the federal project. But these and like considerations are the very factors which the

Administrator must consider in order to perform his statutory duty to "acquire, by purchase, condemnation, or otherwise, such sites * * * as he may deem necessary". See *supra*, p. 3. What the court below seems to have done, therefore, under the guise of statutory construction, is to intrude into the Administrator's function of determining the "necessity" for a particular taking.

It is well settled, however, that the necessity of taking particular lands is a legislative question and that the determination of this question by an administrative officer to whom the authority of selection has been delegated is not subject to judicial review, absent arbitrary or capricious action.[1] And the same rule is applicable when property already devoted to public use is condemned. In *United States* v. *Montana*, 134 F. 2d 194, 197 (C. C. A. 9), certiorari denied, 319 U. S. 772, a proceeding to condemn State-owned school lands, the court held "The federal statute [40 U.

[1] *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Sears* v. *Akron*, 246 U. S. 242, 251; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 708–710; *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States*, 317 U. S. 698; *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; *Barnidge* v. *United States*, 101 F. 2d 295 (C. C. A. 8); *United States* v. *Thelkeld*, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; *Atlantic Coast Line R. Co.* v. *Town of Sebring*, 12 F. 2d 679 (C. C. A. 5).

S. C. 257][2] does not require proof of 'necessity,' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." Again, in *City of Oakland* v. *United States*, 124 F. 2d 959, 964 (C. C. A. 9), certiorari denied, 316 U. S. 679, the court stated that "the Congress has authorized the Secretary of War to determine the necessity for acquiring such property [a city dock area] and the extent of the taking."[3] The federal district courts have likewise refused to review the administrative determination that the condemnation of property devoted to some public use was necessary for the federal project.[4] In *United States* v. *Certain Parcels*

[2] That statute, the General Condemnation Act of August 1, 1888 provides:

"In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

[3] The Act invoked in that case authorized the Secretary of War to acquire lands "needed for the site, location, construction, or prosecution of works" for various military purposes. Act of July 2, 1917, c. 35, 40 Stat. 241, as amended 50 U. S. C. 171.

[4] *United States* v. *385 Acres of Land, Etc.*, 61 F. Supp. 746, 750 (E. D. Wis.); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91, 96–97 (E. D. S. C.); *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *United States* v. *Sixty Acres, More or Less, of Land*, 28 F. Supp. 368 (E. D. Ill.); *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692 (E. D. Mo.); cf. *United States* v. *Forty Acres, More or Less, of Land, Etc.*, 24 F. Supp. 390 (D. Idaho).

of Land, 30 F. Supp. 372, 379 (D. Md.), and *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721 (D. Del.), the courts held that property already devoted to a public use might be condemned as a site for a federal post office, and that the only question open on judicial review was whether the administrative selection was arbitrary and capricious.

The court below relied upon *United States* v. *Southern Power Co.*, 31 F. 2d 852 (C. C. A. 4) as establishing a different rule. See *Carmack* v. *United States*, 135 F. 2d 196, 200. But that case does not support the decision below, for as Judge Chesnut has pointed out (*United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 380 (D. Md.)):

> * * * The court was not there dealing with a case where the power of condemnation was directly resisted, but was rather concerned with what effect a prior condemnation, under congressional power to acquire lands for forestry purposes, had upon an existing right of way for power lines therethrough. Under the particular facts, arising out of prior negotiations between the contending parties, it was held among other things that it would not be equitable to find that the condemnation had destroyed the right of way for the power line. We are dealing here with an entirely different situation.

The *Southern Power* proceeding, moreover, rested on statutes merely authorizing the acquisition of lands for forest reserves; under such a provision, quite unlike that at bar, there was room for serious doubt as to whether the condemnation of a public utility right of way was authorized. 31 F. 2d at 856.[8] While the Fourth Circuit did refer to the rule that public service corporations or municipalities to whom the state power of eminent domain has been delegated, cannot, except by virtue of specific legislation, condemn land already devoted to public use, and suggested that the rule might well be applied to the sovereign in the peculiar situation before it, this rule generally "has no application to the sovereign itself. No case can be found where the rule was applied to a State or to the United States". *United States* v. *Parcel of Land,* 32 F. Supp. 718, 721; see also *United States* v. *Certain Parcels of Land,* 30 F. Supp. 372, 380 (D. Md.); *United States* v. *.8677 Acre of Land in Richland County,* 42 F. Supp. 91, 97. And the court below apparently did not completely adopt the rule referred to in the

[8] The court said: "Now, the purposes of the government in acquiring land for a forest reserve are primarily to protect the timber growing thereon and to guard against drainage conditions which are productive of floods. These purposes are not appreciably interfered with by the fact that the forest lands are crossed by rights of way of public utilities; and it is unreasonable to assume that Congress, in granting the right to acquire lands for forestry purposes, intended to grant also the right to condemn such rights of way. * * *"

Southern Power case because it assumed that if the courts were convinced that necessity did exist, the general authorization would be sufficient.

The decision in the instant case stands alone in requiring specific Congressional authorization to condemn property already devoted to some public use when, in the court's opinion, the taking is not necessary, and in thus unnecessarily burdening the exercise of the sovereign power. Cf. *United States* v. *City of Tiffin*, 190 Fed. 279 (C. C. N. D. Ohio). In the opinion below, the circuit court of appeals suggests that such a limitation is desirable to prevent "possible unfortunate and unnecessary conflicts between State and Federal authority" (R. 664). But here, the local authorities are strongly in favor of the government's project (R. 18–21, 63–76, 92–93, 162–165, 175–176, 417–434, 620), and the majority of voters in the town have approved the plan (R. 349–350, 421–433, 509). The possibility that in some other case federal officials might proceed without due regard to the interests of State or local governments might in the future present a question whether the action in a particular case was arbitrary or capricious, but it does not justify reading into the statute limitations which Congress has not imposed.

2. The selection of the site was not made in bad faith nor was it arbitrary and capricious. M. J. Deutsch, Site Inspector for the Post Office De-

partment, made an extensive investigation at Cape Girardeau, consideration being given to some twenty-two proposals (R. 168–204). His report recommending a site other than that chosen, was considered by a Joint Committee consisting of the Fourth Assistant Postmaster General and the Commisisoner of Public Buildings.* The Committee held hearings over an extended period of time at which anyone interested was allowed to appear (R. 120–126, 297, 482–483, 490, 519, 620–621) and many written reports, letters and opinions were submitted (R. 73–76, 164, 421–433, 483, 490, 509–514, 551–557, 620–621). H. Arthur Tucker, Associate Architect for the Federal Works Agency, investigated and reported on the site here involved (R. 551–557). After giving careful consideration to twenty-two proposals and the different recommendations, the Committee selected five sites for further consideration (R. 122, 145). This number was reduced to two, and then the site finally chosen was selected (R. 122, 145–146). This selection of the Committee was approved by the Postmaster General and the Federal Works Administrator (R. 86–87, 537).

In its declarations of law, the district court stated that this selection "under all the facts in this case, was arbitrary, capricious and unneces-

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*This Committee was established under regulations of the Postmaster General and the Federal Works Administrator (R. 148, 150, 532, 563).

sary" (R. 632). Arbitrary or capricious means in bad faith or according to one's own will or pleasure, without adequate determining principle.[7] Plainly, the selection made after thorough investigation and after careful consideration of the alternatives and of the relevant facts was not arbitrary or capricious. As its own language shows, the district court's conclusion was that, in its opinion, the taking was unnecessary (R. 632, 616–617). The declaration represents simply an attempt of the district court to substitute its judgment for that of the administrative officers as to necessity for the taking. Like the district court in *United States* v. *Merchants Transfer & Storage Co.*, 144 F. 2d 324, 326 (C. C. A. 9), "while protesting the contrary, the court substituted its judgment on the question of public necessity for that of the Secretary." The mere fact that other sites were available does not indicate arbitrary or capricious action. *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 379 (D. Md.).

The circuit court of appeals stated that it did not pass upon the question whether the selection had been made capriciously or arbitrarily (R. 659). Nevertheless, it relied on the findings of the district court and particularly upon the assertion

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[7] *Fox Film Corporation* v. *Trumbull*, 7 F. 2d 715, 727 (D. Conn.); cf. *Puget Sound Power & Light Co.* v. *Public Utility District No. 1*, 123 F. 2d 286, 290 (C. C. A. 9); *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315, 319 (E. D. Ill.).

that the City had no power to make the contract whereby it agreed to exchange the property condemned for the old federal building (R. 660, 662–663). Whether the City had power to convey the property in order to accomplish this exchange is not an issue in the present condemnation proceeding.* In *Woodville, Oklahoma* v. *United States* (C. C. A. 10), decided January 3, 1946,* the court, speaking of the acquisition by the Federal Government of land which had been restricted to use for railroad purposes, said that exercise of the power of eminent domain excused performance of the condition and that "no forfeiture of the estate resulted". In this condemnation proceeding the exchange agreement is material, if at all, only to the determination of compensation, a question not now in issue. Moreover, no reason is suggested why the local government does not have power to settle its claim in the condemnation proceeding by accepting such substitution—the best way of adjusting compensation in such cases. Cf. *Brown* v. *United States*, 263 U. S. 78; *Dohany* v. *Rogers*, 281 U. S. 362; *United States* v. *Miller*, 317 U. S. 369; *Jefferson County, etc.* v. *Tennessee Valley Authority*, 146 F. 2d 564 (C. C. A. 6), certiorari denied, 324 U. S. 871. Certainly, the fact, if it be true, that the local authorities lacked power to accomplish the exchange voluntarily does not

* Copies of this unreported opinion have been filed with the Clerk.

justify ignoring the advantages to the city, recognized by the local officials and by the majority of the voters, nor does it indicate that the Federal officers with all the facts before them acted arbitrarily or capriciously in selecting the site for condemnation.* (Cf. R. 616).

Moreover, the court's statement that the local officials lacked authority to accomplish the exchange is, at best, questionable. The decision in *Board of Regents for Normal School District No. 3* v. *Painter*, 102 Mo. 464, 14 S. W. 938, 940, relied upon by the court (R. 660), related to another tract included in the same deed as to which the use was specifically restricted to school purposes. The parcel here involved is simply limited to public use (R. 625). The Federal Post Office and Court House will certainly constitute a public use and the property exchanged will also be used for public purposes. This exchange was desirable from the standpoint of the local authorities because the present building lacks design and "has been so devoured by termites [that] the floors are propped up by struts and timber braces, to prevent them from falling through at possible cost of life" (R. 553, 188). It seems probable that under these circumstances the Missouri courts

*While the Fouth Assistant Postmaster General believed that the city did have authority to convey (R. 130–131), the present proceeding was instituted to avoid a dispute on this question (R. 91–92, 189–191, 203, 554).

would not hold that the exchange was void. Cf. *Woodville, Oklahoma* v. *United States* (C. C. A. 10), decided January 3, 1946 (see *supra*, note 8); *United States* v. *2.02 Acres of Land, More or Less, Etc.*, 51 F. Supp. 56, 60–61 (S. D. N. Y.).

3. The deeds here involved granted the land "forever" and there was no express provision for reverter or forfeiture if the use for public purposes should cease (R. 625, 106–107, 21–22). Hence, Mrs. Carmack would not, upon abandonment of such use, have an interest in the property. *Chouteau* v. *St. Louis*, 331 Mo. 781, 790, 55 S. W. 2d 299, 301; *Holekamp Lumber Co.* v. *State Highway Commission*, 173 S. W. 2d 938. The circuit court of appeals conceded, upon the first appeal, that Mrs. Carmack did not have such an interest as would permit her to share in compensation. Nevertheless, the court held that she did have standing to object to this proceeding, citing *Mott* v. *Morris*, 249 Mo. 137, 155 S. W. 434, which held that the heir of a grantor of property under a conditional deed had standing to invoke the aid of the court to enforce the condition. That decision is irrelevant here since the question whether the proposed exchange would have violated the restriction in the deed is not now in issue in this condemnation proceeding. See *supra*, p. 18.

Since she had no property interest in the land sought to be condemned, Mrs. Carmack's position would seem to be no different from that of other taxpayers or property owners in the city. Such

persons have no standing to object to condemnation of property of the city, absent a showing of special damage.[10] It is believed, therefore, that the circuit court of appeals erred in holding that Mrs. Carmack was entitled to litigate the questions which the courts below have decided in her favor.

4. The questions presented are of great general importance in the exercise of the power of eminent domain. The Act of 1926 is the general authorization for acquisition, by purchase or condemnation, of lands for many kinds of public buildings. The interpretation to be put upon this Act will have a substantial effect on the acquisition of public buildings under this statute, and will, indeed, have broader application with reference to other statutes using similar language. See *supra*, notes 2 and 3. The condemnation of property for use on a federal project, particularly in populated areas, includes, in a large majority of the cases, the taking of property devoted to public use for utility purposes or for streets, alleys,

[10] *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, 972 (C. C. A. 9), reversed as moot, 289 U. S. 705; *New York Central & H. R. R. Co. v. Yonkers*, 103 N. Y. Supp. 252; *Bilby* v. *District Court of Ninth Judicial Circuit*, 159 Okla. 268, 15 P. 2d 38; *cf. Massachusetts* v. *Mellon*, 262 U. S. 447; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md.); *George W. Armbruster, Jr., Inc.* v. *Wildwood*, 41 F. 2d 823, 830 (D. N. J.); *Benitez* v. *United States*, 141 F. 2d 943, 951 (C. C. A. 1); *Antonakas* v. *Anderson Chamber of Commerce*, 130 S. C. 215, 126 S. E. 35.

parks and the like. Substitution by the courts of their judgment for that of the federal officials as to whether a particular site should be selected would delay and embarrass execution of the public improvements, particularly if objections may be presented by persons not specially damaged by the project.

Except in a situation in which condemnation of particular property is indispensable to a federal project, the decision below would seem to require specific selection, by Act of Congress, of each site already put to a public use. Unless Congress is to be left in doubt as to what language, if any, is necessary or will serve to avoid this obviously impractical construction, review by this Court would seem to be essential.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

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No. 40

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

ISKA W. CARMACK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 40

UNITED STATES OF AMERICA, PETITIONER

v.

ISKA W. CARMACK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the circuit court of appeals is reported in 135 F. 2d 196. The memorandum opinion of the district court after trial upon remand (R. 600–618) is reported in 55 F. Supp. 555. The second opinion of the circuit court of appeals (R. 655) is reported in 151 F. 2d 881.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 6, 1945 (R. 660). The petition for a writ of certiorari was filed on Febru-

ary 6, 1946 and was granted on April 22, 1946 (R. 661). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a taxpayer, property owner, and heir of the grantor to the city of property sought to be condemned, has standing to object to the taking when she has no property interest in the land.

2. Whether, under a statute authorizing the Federal Works Administrator, acting jointly with the Postmaster General, to condemn for post offices such sites "as he may deem necessary", a petition to condemn property already devoted to public use may properly be dismissed on the grounds that, in the opinion of the court, the selected site is not necessary for the public project because other sites are available; condemnation of the selected site will interfere with local governmental functions; and the property is held in trust for the specific purpose to which the land is being devoted.

3. Whether, if Courts may decide the legislative question of the necessity for the taking, the selection as a site for a federal post office of property used for a city park and courthouse was arbitrary and capricious under the facts of this case, and particularly in the light of the approval of local public officials and a majority of local voters.

STATUTE INVOLVED

Section 1 of the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 1427, 40 U. S. C. 341 provides, in part:

> To enable the Federal Works Administrator to provide suitable accommodations in the District of Columbia for the executive departments, and independent establishments of the Government not under any executive department, and for courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Federal Works Agency in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, and to cause to be constructed thereon, and upon lands belonging to the Government conveniently located and available for the purpose (but exclusive of military or naval reservations), adequate and suitable buildings for any of the foregoing purposes, giving preference, where he considers conditions justify such action, to cases where sites for public buildings have prior to May 25, 1926, been acquired or authorized to be acquired, and to enlarge, remodel, and extend existing public buildings under the control of the

Federal Works Agency, and to purchase buildings, if found to be adequate, adaptable, and suitable for the purposes of sections 341, 342, 343, 344, 345, 346 and 347 of this title, together with the sites thereof, and to remodel, enlarge, or extend such buildings and provide proper approaches and other necessary improvements to the sites thereof. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Federal Works Administrator to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quitclaim deed of conveyance: *Provided,* That in carrying into effect the provisions of sections 341, 342, 343, 344, 345, 346, and 347 of this title, insofar as relates to buildings to be used in whole or in part for postoffice purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: *Provided further,* That all sketches, plans, and estimates for buildings shall be approved by the Federal Works Administrator and the heads of the executive departments which are to be located in such building.

The Federal Works Administrator is authorized to carry on the construction work herein authorized by contract, or otherwise, as he deems most advantageous to the United States.

* * * * *

STATEMENT

This is a proceeding instituted by the United States to condemn land as a site for a United States Post Office, Customhouse and Court House in the City of Cape Girardeau, Missouri (R. 29–30). The site is a section of a city park on which are located a court house used by the Court of Common Pleas of Cape Girardeau County, a city library, a bandstand and two memorial monuments (R. 44). The land was originally conveyed in 1807 to the District (now County) of Cape Girardeau by deed of Louis Lorimier which recited that "a Court House and Prison" having been erected on land which he proposed to set aside for a "Seat of Justice," he did thereby "give grant alien convey and confirm [certain described land] unto * * * the * * * Commissioners and assessors in behalf and for the use of the District of Cape Girardeau * * * to be and remain forever Common and public and never to be appropriated to private use * * * in fee Simple" (R. 21–22). In 1814, the seat of Justice having been moved to Jackson, Missouri, the judges of the Court of Common Pleas quit-

claimed the tract here involved along with others to the heirs of Louis Lorimier (R. 102–103). In 1820, the heirs of Louis Lorimier quitclaimed to the inhabitants of the Town of Cape Girardeau several tracts for particular public uses, and other tracts, including the one involved here, without mentioning a specific public use, the land to "remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property" (R. 106–107).

The petition, filed November 22, 1941, sought condemnation of the land and all improvements thereon except the library building (R. 2–9). The City and County of Cape Girardeau, the heirs of the donor of the park property and all others who might claim an interest in the property were named defendants (R. 2–3). The respondent, an heir of Louis Lorimier and a taxpayer and property owner in the City, was the only defendant to contest the petition. The district court found that the respondent had no interest which would permit her to maintain the defenses which she asserted and entered a preliminary decree of condemnation on March 5, 1942 (R. 601).

Upon appeal by respondent, the decree was reversed. *Carmack* v. *United States,* 135 F. 2d 196. The court stated that, conceding that Mrs. Carmack had no such interest as would entitle her to participate in compensation payable for the prop-

erty, "she would seem to have more than the general interest of a nonproperty-owning inhabitant", and held that she "had such special interest as entitled her to object to the property being taken for a purpose destructive of the public use to which it had been dedicated by her ancestor". 135 F. 2d at 199. It concluded that the district court therefore erred in not permitting her to maintain her defenses. The court then stated that in the absence of express statutory authority or direction to take property already devoted to another public use, that authority has been denied unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken, and held that, under the circumstances presented, no necessity for taking this particular property already devoted to a public purpose was to be implied from the necessity for the proposed public structure. It concluded that whether the determination of necessity by the Acting Administrator of the Federal Works Agency was arbitrary or capricious was an issue which should be decided by the trial court. The decree was reversed on the additional ground that the petition did not allege nor did the evidence show that the Federal Works Administrator and the Postmaster General had acted jointly in selecting the site. 135 F. 2d at 200–201.

After remand, on June 10, 1943, Postmaster General Frank C. Walker and Federal Works Ad-

ministrator Philip B. Fleming, acting jointly, made a formal selection of this site (R. 86–87). Thereafter, a petition for condemnation, amended to allege the joint selection, was filed on August 14, 1943 (R. 27). Again all defendants defaulted except Mrs. Carmack who answered, denying the authority of the United States to condemn the property and the necessity of its taking, and alleging that the selection was made arbitrarily and capriciously (R. 39–55, 634). A hearing was had on these questions in April 1944 (R. 55). The United States presented documentary and oral evidence of the matters leading to the recommendation of this site by the Joint Committee, consisting of the Fourth Assistant Postmaster General and the Commissioner of Public Buildings of the Federal Works Agency, and the selection by the Postmaster General and Federal Works Administrator. The evidence showed that the relative advantages and disadvantages of some twenty-two proposals were considered (R. 122, 145–146), and that five sites were then selected for further consideration (R. 122, 145). This number was reduced to two and then the site finally chosen was selected (R. 122, 145–146). Mrs. Carmack presented evidence to show that the choice of this site was unnecessary and not to the best interests of the city. Figuring prominently in the evidence of both parties was a proposal by the City of Cape Girardeau, which the United States accepted,

to exchange the property involved in these proceedings for the present federal building (R. 63–76, 421–433). The exchange was proposed by local officials and has their full support and that of an impressive number of business men in the city, as well as the local postmaster (R. 18–21, 63–76, 92–93, 162–165, 175–176, 188–189, 199–201, 417–434, 620). The majority of the qualified voters in the City approved it (R. 349–350, 421–433, 509). The building which now houses the Court of Common Pleas of Cape Girardeau County "has been so devoured by termites [that] the floors are propped up by struts and timber braces, to prevent them from falling through at possible cost of life" (R. 553). The exchange would save the city "a large sum of money" (R. 178, 188, 190, 424, 497, 555). It would likewise result in a financial saving to the United States, since "no other acceptable offer for an exchange or sale of the present [Federal] property is securable" (R. 176, 497, 519, 555). In the event of exchange, provision was made for the uninterrupted administration of the Court of Common Pleas (R. 63–65, 67, 80, 92). Mrs. Carmack contended that the city lacked authority to convey this property; that, therefore, the agreement was illegal; and that condemnation by the United States of the city property should not be permitted as means of effecting an illegal agreement (R. 46–47).

On May 19, 1944, the district court filed its findings of fact, conclusions of law and a memorandum opinion wherein it ruled in Mrs. Carmack's favor, and a decree dismissing the amended petition was thereafter entered (R. 632–636). The district court found that the public use for which the Government sought to acquire the property was not "superior in rank" to the existing use, that there was other property available better fitted for the Government's project, that failure to secure the site would not result in failure of the Government project, and that condemnation of the site involved would interfere with local governmental functions (R. 629–630). It concluded that the city officials had no power to exchange the property, that there was no necessity for taking the site in question and that the selection of the site by the Federal Works Administrator and the Postmaster General was "arbitrary, capricious and unnecessary" (R. 631–632).

The circuit court of appeals affirmed on the ground that statutory authority did not exist for the condemnation of property already devoted to a public use under the circumstances described, stating that it did not consider the question whether the selection was arbitrary or capricious (R. 656).

SPECIFICATION OF ERRORS TO BE URGED

The courts below erred:

1. In holding that the Federal Works Administrator and the Postmaster General lacked authority to condemn the lands in question.

2. In holding, in effect, that the question of the necessity for taking the lands is a judicial one.

3. In holding that the court can review the good faith determination of the Federal Works Administrator and the Postmaster General as to the necessity for the taking.

4. In passing upon the authority of the city officials to exchange the property when that question was not in issue.

5. In construing the phrase "arbitrary and capricious" to mean unnecessary in the opinion of the court.

6. In holding that the authority to condemn land devoted to public use is more limited than that to condemn private property.

7. In holding that Iska Carmack had standing to contest the condemnation petition.

8. In failing to hold that the condemnation of the property was not arbitrary, capricious or otherwise unlawful.

9. In dismissing the Government's petition in condemnation.

SUMMARY OF ARGUMENT

I

Iska W. Carmack has no standing to attack the validity of these condemnation proceedings since she has no right in the property taken, and stands in no better position than any other taxpayer.

The City of Cape Girardeau holds the property here condemned in fee simple and, there being no reservation of a right of re-entry, or provision for reverter or forfeiture if use for a public purpose should cease, Mrs. Carmack has no right, title or interest in or to the property sought to be condemned.

The mere fact that a person is a taxpayer of a city does not give him a standing to object to condemnation of city property absent a showing of special damage. Since Mrs. Carmack, who was the only one to object to the taking, did not show that she would be specially damaged, she had no standing to contest the proceedings which should not, therefore, have been dismissed.

II

The United States has the Constitutional power to condemn land devoted to prior public use by a State or its political subdivisions. That power has been exercised by Section 1 of the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended, 40 U. S. C. sec. 341, which, in general terms, author-

izes the Federal Works Administrator to acquire such sites as he deems necessary for court houses, post offices and the like. It does not distinguish between the administrative authority to select private and public property as a site for the public project. There is nothing in the legislative history of the statute or any other matter bearing on the legislative purpose, to warrant reading into the statute a restriction on the power of the Administrator preventing him from selecting any site occupied by a political subdivision of a State for a "governmental purpose of equal rank." The rule of law that a statute generally authorizing municipalities, public utilities or other corporations to condemn is not sufficient to authorize the taking of property already devoted to public use, and that such property cannot be condemned in the absence of specific legislation, does not apply to the United States. The reasons for the rule are not relevant to condemnations by the United States. A requirement that Congress specifically approve each selection would seriously embarrass and delay the execution of the Federal purposes since the completion of many federal projects requires the condemnation of property devoted to local public uses such as streets, alleys, public utilities and the like. In any event, the rule would not apply where the prior public user consents to the condemnation.

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III

The holding of the lower court that there was no necessity for taking these lands because other sites were available for the post office and that the failure to secure this land would not result in failure of the federal project is beyond the scope of the judicial power. The court's judgment and discretion may not be substituted for that of the officials to whom the responsibility is entrusted by law. The determination of necessity by an administrative officer to whom the authority of selection has been delegated is not subject to judicial review—certainly not in the absence of arbitrary or capricious action. And this is equally true when property already devoted to a public use is condemned.

The action of the administrative officials here was not arbitrary or capricious. The site was not selected hastily or without adequate investigation. In making their selection, the administrative officials considered and evaluated the relative interests of all parties concerned—the Federal Government, the local government, and the citizenry of the municipality. The fact that the administrative officials, in making their selection, considered an exchange of the present federal building and the land on which it is situated for the site chosen, does not make that selection arbitrary and capricious. Such an exchange would be

mutually beneficial and effect a monetary savings both to the city and the Federal Government. These considerations were properly taken into account.

Institution of condemnation proceedings to accomplish the exchange, there being a doubt that the City had authority to convey directly, does not support a conclusion that the administrative action was arbitrary and capricious. There is no evidence that selection of the park site was conditioned upon the legal right of the city to convey it voluntarily. Whether the local authorities had the power to accomplish the exchange is not an issue in this case, in which there is no attempt to enforce a voluntary transfer.

ARGUMENT

I

ISKA W. CARMACK IS NOT ENTITLED TO LITIGATE THE QUESTION IN ISSUE

Unless a person has some right, title or interest in the property taken, he has no standing to challenge the right of the Government to condemn. Thus, in *Benitez* v. *United States,* 141 F. 2d 943, 951 (C. C. A. 1), certiorari denied, 324 U. S. 859, the court concluded that a defendant named in the petition had "no standing to challenge the right of the government, under the applicable condemnation statutes, to condemn the properties for the public use set forth in the

petition for condemnation" since she had lost her interest in the properties when the petition for condemnation was filed. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73–74; *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406–407. Respondent, Iska W. Carmack, claims to have standing to oppose this condemnation proceeding on two grounds.[1] First, she claims an interest in the real estate sought to be condemned as a direct heir of Louis Lorimier, the original grantor (R. 40). Second, she claims to be entitled to oppose the condemnation as a taxpayer and owner of lots in Cape Girardeau, Missouri (R. 40). But the fact that she is included in each of the categories described gives her no standing to contest the condemnation proceeding.

A. *Iska W. Carmack, as an heir of Louis Lorimier, has no such interest in the land sought to be condemned as to give her the right to oppose its condemnation.*—By their deed of 1820, the heirs of Louis Lorimier conveyed the property here sought to be condemned to the inhabitants of the town of Cape Girardeau "for their use, benefit and behoof forever" (R. 106). The deed limited use of certain parcels, not here in-

[1] While the lower court did not pass on this question on the second appeal, it did so in its first decision remanding the case, and the point may, therefore, be raised at this time. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 257–258; *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280, 284; *Smith* v. *McCullough*, 270 U. S. 456, 461.

volved, to specific named purposes and the only restriction on the remaining property was that it should be used for public purposes.[2] There was no reservation of a right of re-entry, or provision for reverter or forfeiture if the use for public purpose should cease (R. 106–107, 625). Under Missouri decisions, the deed of 1820 conveyed a fee simple and not a determinable fee or a fee on condition subsequent. *Chouteau* v. *St. Louis,* 331 Mo. 781, 793, 55 S. W. 2d 299, 301; *Hand* v. *St. Louis,* 158 Mo. 204, 59 S. W. 92; *Williams* v. *St. Louis,* 331 Mo. 1206, 56 S. W. 2d 1050; *Holekamp Lumber Co.* v. *State Highway Commission,* 173 S. W. 2d 938. If the rules of construction set forth in those decisions are applied in the present case, it is evident that the 1820 deed conveyed a fee simple title and that the respondent has no right, title or interest in or to the property sought to be condemned.[3]

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[2] The deed provision reads as follows (R. 107):
"Provided always that the several tracts or parcels of Land thus granted to the Town of Cape Girardeau and the Citizens Thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property."

Although it is not important in the present case, it is questionable whether use for a federal post office would violate this restriction. See *infra,* note 17, pp. 44–45.

[3] The Missouri courts' construction of deeds to real property in that State is, of course, binding on the federal courts. *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 484. Under the same principles, the 1807 deed of Louis Lorimier (R. 21–22)

The circuit court of appeals conceded (135 F. 2d 196, 199) that Mrs. Carmack did not have such an interest as would permit her to share in compensation. Nevertheless, the court held that she did have standing to object to this proceeding, despite the fact that her interest derived only from her kinship with the deceased grantor. *Mott* v. *Morris*, 249 Mo. 137, 155 S. W. 434, relied upon by the court below, is distinguishable and is, in any event, only a decision on local law which is not binding in this condemnation proceeding on the substantive question of standing to sue in the federal courts.[4] The *Mott* case involved land deeded to the trustees of two churches with the provision that "neither church nor its trustees are to convey away its half interest for other than church purposes." The trustees admittedly sought to convey the property for other than church purposes. The court held that the trustees could not alien the trust estate for any except church purposes and that although the heir had no reversionary interest under the terms of her

likewise conveyed fee title. Since the two deeds thus had the same effect, it is immaterial whether the title flows from the 1807 deed, as Mrs. Carmack originally contended (R. 12), or from the 1820 deed, as the court below treated the case on the second appeal (R. 657).

[4] The standing of persons to challenge the right to condemn would seem to be a question of substance and not merely a matter of "practice, pleadings, forms and proceedings" which, under the condemnation statute, Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. 258, is governed by local law. Cf. *United States* v. *Miller*, 317 U. S. 369, 379–380.

ancestor's grant, she had the right to ask the interference of an equity court to preserve the trust created. The court was careful to limit its decision to "the determination only of the precise case in hand," and pointed out that the case was not one where the execution of the use had become impossible in fact. 249 Mo. at 145. Even if this ruling were authoritative in the federal courts, it would be irrelevant here, since whether the city had power to convey the property is not an issue in this proceeding. See *infra*, pp. 43–44. Hence, any standing Mrs. Carmack might have, in a state proceeding in equity, to enforce the use limitation put upon the property by her ancestor does not encompass a right to challenge condemnation proceedings in which the use limitation is patently irrelevant.

B. *Iska W. Carmack has no standing to oppose the condemnation by reason of her being a taxpayer and owner of lots in Cape Girardeau, Missouri.*— Since she has no property interest in the land sought to be condemned, Mrs. Carmack's position is no different from that of other taxpayers or property owners in the city. The mere fact that a person is a taxpayer of a city does not give him a standing to object to condemnation of city property absent a showing of "special damages, or injury different and distinguished from his injury as a member of the public at large". *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, 972 (C. C. A. 9), reversed as moot, 289 U. S. 705; *New York Central & H. R. R. Co.* v. *Yonkers*, 103 N. Y.,

Supp. 252; *Bilby* v. *District Court of Ninth Judicial Circuit*, 159 Okla. 268, 15 P. 2d 38. *Cf. Massachusetts* v. *Mellon*, 262 U. S. 447; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md.); *George W. Armbruster, Jr., Inc.* v. *Wildwood*, 41 F. 2d 823, 830 (D. N. J.); *Antonakas* v. *Anderson Chamber of Commerce*, 130 S. C. 215, 126 S. E. 35.

Nothing in the record of this case indicates that the respondent, as a property owner, would be injured in kind different from others. In fact, paragraphs I (R. 39), V (R. 42), VI (R. 43), and VII (R. 45) of the respondent's answer in the district court, which contain the only allegations in the pleadings that could be construed as alleging injury to a property owner in the city, clearly apply to "the inhabitants, citizens, taxpayers, and lot owners in said City of Cape Girardeau" generally (R. 40). The taxpayers of an area where a federal project is to be located often have divergent views as to the best location for it. Their views are considered by the administrative officer in selecting the site for the project as they were here. (See *infra*, pp. 37–38, 39). To permit persons who have no interest greater than that of other taxpayers of the area to contest the proceedings would seriously encumber the administration of condemnation proceedings.[4]

It is submitted that for the reasons stated, Mrs. Carmack has no standing to object to the con-

[4] See *supra*, note 4, p. 18.

demnation, and, since she is the only party to contest the proceeding, it becomes unnecessary for this Court to consider the matters put in issue by the pleadings.

II

THE ADMINISTRATIVE OFFICERS WERE AUTHORIZED TO SELECT THIS PARTICULAR SITE FOR THE GOVERNMENT POST OFFICE PROJECT

A. *The Federal Government has constitutional power to condemn property already devoted to public use.*—There is, of course, no doubt that here the land is sought to be condemned for public use; *i. e.*, a post office, custom house and court building. The fact that land is already devoted to some local public use does not exempt it from condemnation by the federal government, *Oklahoma* ex rel. *Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 534; *Wayne County* v. *United States*, 53 C. Cls. 417, affirmed, 252 U. S. 574; *United States* v. *Montana*, 134 F. 2d 194 (C. C. A. 9), certiorari denied, 319 U. S. 772; *City of Oakland* v. *United States*, 124 F. 2d 959 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *Wheeler Tp.*, 66 F. 2d 977 (C. C. A. 8). By reason of the supremacy clause of the Federal Constitution, U. S. Const., Art. VI, par. 2, the Federal Government has power to condemn such lands regardless of the purpose for which the land is locally used. Thus, the "doctrine of comparative uses" does not apply in con-

demnation proceedings by the United States.[6] As Mr. Justice Holmes stated in *Sanitary District* v. *United States*, 266 U. S. 405, 425: "This is not a controversy between equals." Whenever the constitutional powers of the Federal Government and those of a State or its subdivision come into confliet, the latter must yield. *Florida* v. *Mellon*, 273 U. S. 12, 17; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527, 534–535. To permit a comparison of uses and a finding of an equal or superior use in a State or its instrumentalities would promote rather than avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. This may not be done. *United States* v. *Allegheny County*, 322 U. S. 174, 183. Thus, there can be no question that the Court below was correct in its statement that "the inherent power of the United States to take the lands in question could not be doubted" (R. 656).

[6] *United States* v. *Tiffin*, 190 Fed. 279 (N. D. Ohio); *United States* v. *Jotham Bixby Co.*, 55 F. 2d 317 (S. D. Calif.), affirmed *sub nom. C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705; *United States* v. *Certain Parcels of Land in Town of Denton*, 30 F. Supp. 372 (D. Md.); *United States* v. *60 Acres of Land in Williamson County*, 28 F. Supp. 368 (E. D. Ill.); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E. D. S. C.); *United States* v. *Parcel of Land*, 32 F. Supp. 718 (D. Del.); *United States* v. *72 Acres of Land*, 37 F. Supp. 297 (N. D. Cal.). "Even a county seat could not endure as an obstruction and barrier to the free exercise of governmental authority." *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 698 (C. D. Mo.).

B. *The administrative officers were authorized by statute to select this site for the public project.*—Section 1 of the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 40 U. S. C. 341, authorizes the Federal Works Administrator to acquire by purchase or condemnation for post offices and other buildings "such sites and addition to sites as he may deem necessary" provided that the Public Works Administrator and the Postmaster General act jointly in the selection of sites to be used for post offices. The lower court, ostensibly as a matter of statutory interpretation, read into the statute a restriction on the power of the Administrator; it would prevent him from selecting any site, occupied by a political subdivision of a State for "a governmental purpose of equal rank" for which it was held in trust with no power to authorize a different use, where the taking "would, as the District Court has found in this case, materially interfere with necessary local governmental functions". (R. 659). This wholly gratuitous limitation does not purport to be based upon the words of the Act, construction of the statute as a whole, its legislative history,[7] or any other matter bearing on the

[7] There is nothing in the legislative history of the statute evincing a Congressional intent to make the decision of the Administrator subject to judicial review when he chooses a site already devoted to a public use. H. Reps. Nos. 132 and 1223, 69th Cong. 1st Sess.: S. Rep. No. 197, 69th Cong. 1st Sess. Indeed, the minority views expressed in H. Rep. No. 132,

legislative purpose. Thus the decision below cannot be rested upon statutory interpretation.

The only possible basis for the holding would be the existence of a rule of law that general condemnation statutes must be so construed. It was the court's view that because this particular property is devoted to a prior public use, the general legislation is not sufficient to authorize its taking and the property cannot be condemned in the absence of a specific Act of Congress authorizing the taking of the particular property. The argument is not new. It was fully considered and rejected in the case of *United States* v. *City of Tiffin*, 190 Fed. 279 (C. C. N. D. Ohio). It was there pointed out that the contention is premised upon the rule that general legislation does not authorize a taking by a municipal or public service corporation, or other donee of the sovereign, of property already devoted to public use unless the intention of the legislature in conferring authority to that effect has been manifested in express terms or may be implied from the fact that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant was created.[8] As

pp. 6, 10, indicate that Congress was aware that it was delegating *in toto* the function of choice, theretofore exercised by it, to an administrative official. In the course of debate on the bill, the point that there was a complete delegation of Congressional authority is repeatedly made. See 67 Cong. Rec. 4023, 4026, 4028, 8354, 8356, 8359, 8494, 8567.

[8] *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349; *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 195 U. S. 594, 597; *City of Norton* v. *Lowden*, 84 F. 2d 663 (C. C. A.

pointed out in the *Tiffin* case, application of the rule would be to ignore the difference in status between the United States, in its relation to lands sought to be devoted to public use, and the parties attempting to condemn in the cases giving rise to the rule. The court stated (190 Fed. at 281):

> * * * The Legislature, speaking the voice of paramount authority over all property, private as well as public, may, it is conceded, authorize the submission of property already in the public use to another public use, even when the conflicting public uses are those exercised by private public service corporations, if it specially determines upon such a course by particular legislation, and the rule invoked but operates to hold this right in the sovereign power until it clearly appears to have been given to some creature of the sovereignty, such as a municipal or public service corporation. The rule, having existence only to protect the sovereign power against its creatures, plainly, we think, may not consistently be offered to obstruct the supreme authority in the exercise of its administrative and sovereign functions.

General legislation like that at bar has been held sufficient to justify the taking for post offices of

10); *United States* v. *Tiffin*, 190 Fed. 279 (C. C. N. D. Ohio); *Old Colony Railroad Company* v. *Framingham Water Co.*, 153 Mass. 561, 27 N. E. 662; *Easthampton* v. *County Commissioners of Hampshire*, 154 Mass. 424, 28 N. E. 298. See *United States* v. *Southern Power Co.*, 31 F. 2d 852, 856 (C. C. A. 4).

public property devoted to a prior public use. *C. M. Patten & Co.* v. *United States,* 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705; *United States* v. *City of Tiffin,* 190 Fed. 279, 281 (C. C. N. D. Ohio); *United States* v. *Certain Parcels of Land,* 30 F. Supp. 372 (D. Md.); *United States* v. *Parcel of Land,* 32 F. Supp. 718 (D. Del.). In the present case, we are not "dealing with a question of interpretation of the powers of two separate corporations under the laws of a particular State, but with the sovereign and paramount authority of the federal government to acquire property necessary or suitable for a post office, which is clearly within the express grant of power given by the Federal Constitution. * * * the nature of the subject matter necessarily implies that the [Federal Works Administrator and Postmaster General] may select sites already in public use * * *." *United States* v. *Certain Parcels of Land,* 30 F. Supp. 372, 379, 380 (D. Md.); *United States* v. *Parcel of Land,* 32 F. Supp. 718 (D. Del.); *United States* v. *Jotham Bixby Co.,* 55 F. 2d 317 (S. D. Cal.); *C. M. Patten & Co.* v. *United States,* 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705.

Likewise, general legislation contemplating the acquisition of property for purposes other than post offices consistently has been held to authorize the selection of property already devoted to public uses. *United States* v. *Montana,* 134 F. 2d 194 (C. C. A. 9), certiorari denied, 319 U. S. 772;

Oakland v. *United States*, 124 F. 2d 959 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E. D. S. C.); *United States* v. *Forty Acres, More or Less, of Land*, 24 F. Supp. 390 (D. Idaho); *United States* v. *Sixty Acres, More or Less, of Land*, 28 F. Supp. 368 (E. D. Ill.). "A Congressional intention that the United States have the right to condemn any land necessary to the successful construction of the projects lawfully planned under the legislation here in question, even though such land already be devoted to a public use, is clearly apparent and necessarily implied." *United States* v. *Sixty Acres, More or Less, of Land*, 28 F. Supp. 368, 373 (E. D. Ill.). "Congress has delegated to the President and the Federal Works Administrator [and the Postmaster General] * * * the power to select sites for such * * * buildings as described in this controversy. To hold otherwise would be to say that the United States has no authority to condemn property * * * because a State highway runs through a part of the land sought to be condemned, and to state that the United States, before proceeding further upon this project, * * * must go back to Congress and go through the uncertainty and delay of attempting to obtain additional legislation." *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91, 96–97 (E. D. S. C.).

The court below, in its first opinion, relied on the case of *United States* v. *Southern Power Co.*, 31 F. 2d 852 (C. C. A. 4), as supporting its view that "in the absence of express statutory authority or direction to take property already devoted to another public use, that authority has been denied unless the legislation as to the specific project is such as to give rise to an implication that such property might be taken." *Carmack* v. *United States*, 135 F. 2d 196, 199–200. The case is not referred to in its second opinion and it is presumed that the court no longer regards it as authority to support its position. Certainly the *Southern Power* case cannot be considered as establishing that property devoted to a public use cannot be taken under general legislation. While the Circuit Court of Appeals for the Fourth Circuit stated the general rule invoked by the lower court in this case, it recognized the fact that the rule had not been applied where a sovereign was exercising for its immediate purposes the power of condemnation. It did, however, suggest that it might be applied "where the prior public use could not reasonably interfere with the purpose for which condemnation is authorized" (31 F. 2d 856). It should be remembered that the *Southern Power* proceeding rested on statutes authorizing the acquisition of lands for forest reserves, and the court stated that the presence of power line rights of way could not be thought to interfere with the acquisition of land for forestry purposes. The case

is well analyzed by Judge Chesnut in *United States v. Certain Parcels of Land*, 30 F. Supp. 372, 380 (D. Md.) as follows:

> * * * The court was not there dealing with a case where the power of condemnation was directly resisted, but was rather concerned with what effect a prior condemnation, under congressional power to acquire lands for forestry purposes, had upon an existing right of way for power lines therethrough. Under the particular facts, arising out of prior negotiations between the contending parties, it was held among other things that it would not be equitable to find that the condemnation had destroyed the right of way for the power line. We are dealing here with an entirely different situation.

The condemnation of lands for federal projects, particularly in populated areas, includes, in a great many cases, the taking of property devoted to public use for utility purposes or for streets, alleys, parks and the like. A requirement that Congress specifically approve each selection in such cases obviously would seriously embarrass and delay the execution of the federal purpose. There is no warrant for the imposition of such a limitation on the operations of the Federal Government and certainly there is nothing to indicate that Congress intended to impose such a burden. The decision of the court below, which is the only instance in which the courts have denied authority to condemn publicly owned

property, cannot, therefore, be supported by either reason or authority.

In the opinion below, the circuit court of appeals suggests that unless it be held that a special and specific Act of Congress is required in each instance where publicly held property is sought as the site for a particular federal project, "it would subject the States and their political subdivisions to an interference with necessary local governmental functions at the decision of Federal administrative officials, with possible unfortunate and unnecessary conflicts between State and Federal authority" (R. 659). But, in the instant case, the local authorities are strongly in favor of the Government's project, a majority of voters in the town have approved the plan, and there will be no undue interference, *infra*, pp. 39–40. The possibility that in some other case federal officials might proceed without due regard to the interests of State or local governments might conceivably present a question whether the action in a particular case was arbitrary or capricious, but it does not justify a departure from settled principles of law and a reading into the statute of limitations which Congress has not imposed. Indeed, even if we assume, *arguendo*, that the decision below states the correct general rule as to the condemnation of publicly used property, the rationale for the "rule" would make it inapplicable where the prior user for a public purpose consented to and supported the condemnation.

III

THE COURTS BELOW WERE NOT WARRANTED IN REJECTING THE ADMINISTRATIVE OFFICIALS' SELECTION OF THIS PARTICULAR SITE FOR THE FEDERAL PROJECT

A. *An administrative determination of necessity is not the subject of judicial review.*—Implicit in the holding of the lower court is its view that there was no necessity for taking these lands because other sites were available for the post office and that the failure to secure this land would not defeat the federal project. The court has, in effect, transferred from the Administrator to itself the determination of whether a particular site is necessary. This may not be done. Certainly Congress, by the plain language of the statute, did not evidence an intention to have any entity but the administrative officials determine which particular site should be chosen (see *supra*, p. 3). Moreover, it is well settled that the determination of necessity by an administrative officer to whom the authority of selection has been delegated is not subject to judicial review.*

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* *United States* ex rel. *T. V. A.* v. *Welch*, October Term, 1945, Nos. 528–533; *Boom Co.* v. *Patterson*, 98 U. S. 403, 406; *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349; *Sears* v. *Akron*, 246 U. S. 242, 251; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 708–710; *United States* v. *Montana*, 134 F. 2d 194, 197 (C. C. A. 9), certiorari denied, 319 U. S. 722; *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States*, 317 U. S. 698.

And the same rule is applicable when property already devoted to a public use is condemned. *United States* v. *Montana*, 134 F. 2d 194, 197 (C. C. A. 9), certiorari denied, 319 U. S. 772; *Oakland* v. *United States*, 124 F. 2d 959, 964 (C. C. A. 9), certiorari denied, 316 U. S. 679; *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705; *Atlantic Coast Line R. Co.* v. *Sebring*, 12 F. 2d 679, 681 (C. C. A. 5).

In *United States* v. *Montana, supra*, a proceeding to condemn state-owned school lands, the court held that "The federal statute [40 U. S. C. 257][10] does not require proof of 'necessity' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." Again, in *Oakland* v. *United States, supra*, the court stated that "the Congress has authorized the Secretary of War to determine the necessity for acquiring such property [a city dock area] and the extent of the taking."[11] The federal district courts have

[10] That statute, the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, provides:

"In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

[11] The Act invoked in that case authorized the Secretary of War to acquire lands "needed for the site, location, construction, or prosecution of works" for various military purposes. Act of July 2, 1917, c. 35, 40 Stat. 241, as amended, 50 U. S. C. 171.

likewise refused to review the administrative determination that the condemnation of property devoted to some public use was necessary for the federal project.[12] In *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 379 (D. Md.), and *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721 (D. Del.), the courts held that property already devoted to a public use might be condemned as a site for a federal post office, and that the only question open on judicial review was whether the administrative selection was arbitrary and capricious.

The lower courts have decided the instant case as though it were an appeal from the decision of the acquiring agencies as to the necessity, wisdom and expediency of locating the post office, custom-house and federal court building on the site selected. The action of the lower courts is clearly without the ambit of the judicial power under the legislation involved. *Decatur* v. *Paulding*, 14 Pet. 497, 515–516; *Atlantic Coast Line R. Co.* v. *Sebring*, 12 F. 2d 679, 681 (C. C. A. 5). Selection of a site involves the exercise of judgment and

[12] *United States* v. *385 Acres of Land, Etc.*, 61 F. Supp. 746, 750 (E. D. Wis.); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91, 96–97 (E. D. S. C.); *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *United States* v. *Sixty Acres, More or Less, of Land*, 28 F. Supp. 368 (E. D. Ill.); *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692 (E. D. Mo.); cf. *United States* v. *Forty Acres, More or Less, of Land, Etc.*, 24 F. Supp. 390 (D. Idaho).

discretion. The court's judgment and discretion may not be substituted for that of the officials to whom the responsibility is entrusted by law. *Marbury* v. *Madison,* 1 Cranch 137, 166; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Bragg* v. *Weaver,* 251 U. S. 57; *Joslin Mfg. Co.* v. *Providence,* 262 U. S. 668; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 130–132. Cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 303.

The project in this case is not merely the construction of a post office, customhouse and court building but the construction of such a building *in the city selected and upon the site selected* by the officials authorized to make those determinations. The city and site are as integral a part of the project as the purposes for which they were selected. Even though another city or another site might, in the court's opinion, be chosen and the federal purposes thereby reasonably served, nevertheless, in that event, *this project,* which the Postmaster General and Federal Works Administrator have determined to be necessary, would fail. The courts are without power thus to "clog the wheels of government by reviewing the action" of the administrative officers. *Louisiana* v. *McAdoo,* 234 U. S. 627, 632. In *United States* v. *Merchants Transfer & Storage Co.,* 144 F. 2d 324, 326 (C. C. A. 9), the trial court, upon whose opinion respondent relies (Br. in Opp. 32), was criticized because "while protesting to the contrary, the court substituted its judgment on the

question of public necessity for that of the Secretary". In the present case, the lower courts openly substituted their judgment for that of the selecting officials. In so doing they committed error.

The lower court expressly approved the finding of the trial court that there was no necessity for the taking of the land described in the petition for condemnation, apparently basing its approval on the fact that in its opinion a site more desirable than the one chosen exits (R. 658). That opinion presumably rests on the fact that M. J. Deutsch, Site Inspector for the Post Office Department, placed the site chosen as his second choice in his report to the Joint Committee. In addition to the fact that second choice on a list of twenty-two sites is very high, the court overlooked the fact that the report "was not written by the official who had the burden of determining the question of necessity but by a subordinate agent with whom * * * [selecting officials] may or may not have agreed." *United States* v. *Meyer*, 113 F. 2d 387, 392 (C. C. A. 7), certiorari denied, 311 U. S. 706. Such circumstances might have a bearing on the question of whether the action of the Administrator was arbitrary and capricious, but certainly can have no other place in this case since, as has been shown, the issue of necessity is not one for judicial determination.

B. *The action of the administrative officials was not arbitrary or capricious.*—If the broader

view of some of the lower courts is taken, the outermost limit of the judicial power in this case would be to determine whether the selection was arbitrary or capricious.[13] The circuit court of appeals stated that it did not find it necessary to pass upon the question (R. 656). However, it detailed the findings of the trial court which prompted that court's conclusion that the selection "under all the facts in this case, was arbitrary, capricious and unnecessary" (R. 632). To measure the phrase "arbitrary and capricious" by the yardstick of "necessity", as the district court did in this case, is to convert the determination of necessity from a legislative question into a judicial one. To prevent this unauthorized extension of the power of the judiciary, the phrase must be used in its ordinary sense to mean in bad faith or according to one's own will or pleasure, without adequate determining principle.[14] No element of bad faith or lack of

[13] *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; *Barnidge* v. *United States*, 101 F. 2d 295 (C. C. A. 8); *United States* v. *Thelkeld*, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; *Atlantic Coast Line R. Co.* v. *Town of Sebring*, 12 F. 2d 679 (C. C. A. 5). See also *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. C. A. 9), reversed as moot, 289 U. S. 705. Compare cases cited *supra*, note 9, p. 31.

Whether the necessity for the taking may be judicially reviewed to this extent is a question which need not be decided in this case since it is plain that the action here taken was neither arbitrary nor capricious. See *infra*, pp. 37–46.

[14] *Fox Film Corporation* v. *Trumbull*, 7 F. 2d 715, 727 (D. Conn.); cf. *Puget Sound Power & Light Co.* v. *Public Utility District No. 1*, 123 F. 2d 286, 290 (C. C. A. 9); *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315, 319 (E. D. Ill.).

reason is present in the evidence in this case. On the contrary, the record reveals many sound reasons, relied upon in good faith, for selecting this site.

1. *The site was not selected hastily or without adequate investigation.*—The Joint Committee, consisting of the Fourth Assistant Postmaster General and the Commissioner of Public Buildings, appointed by the Postmaster General and the Administrator, respectively,[15] held a number of hearings, over an extended period of time, at which every person who so desired was allowed to state his views and present evidence as to the site to be selected (R. 120–126, 297, 482–483, 490, 519, 620–621). Many written reports, letters and opinions were submitted to and considered by the Committee (R. 73–76, 164, 168–204, 421–433, 483, 490, 509–514, 551–557, 620–621). Included among these were detailed studies by M. J. Deutsch, Site Inspector for the Post Office Department, and H. Arthur Tucker, Associate Architect for the Federal Works Agency, both of whom visited Cape Girardeau and made extensive investigations (R. 168–204, 551–557). The Com-

[15] The Committee was appointed pursuant to regulations of the Federal Works Agency and the Post Office Department (R. 148, 150, 532, 563) as authorized by 5 U. S. C. 22, 369; 40 U. S. C. 341, 347. The Act of June 23, 1874, c. 476, sec. 2, 18 Stat. 276, 40 U. S. C. 254, which related to certain details of site selections under a commissioner procedure, has been superseded by subsequent legislation. See 40 U. S. C. 341–345.

mittee met with and repeatedly sought the advice of E. R. Witman, Fiscal Manager of the Public Buildings Administration, and J. F. Betterley, Superintendent of the Division of Post Office Quarters of the Post Office Department (R. 122, 125–126, 128–129, 132, 139, 293, 295–296, 344, 351–352). Twenty-two proposals were "carefully gone over" by the Committee (R. 122, 145, 168–195). From these, five sites were selected for further consideration (R. 122, 145). Finally, the number was reduced to two and then to the one involved in this proceeding (R. 122, 145–146). On April 7, 1941, the Joint Committee presented its selection in the form of a recommendation to the Postmaster General and Federal Works Administrator for approval (R. 150, 191). On the basis of that recommendation of the Committee and its official records, the Postmaster General and the Federal Works Administrator approved the selection on June 10, 1943 (R. 86–87, 536).

2. *The economies to all parties resulting from an exchange properly entered into the deliberations of the administrative officials.*—Despite the showing of the careful investigation made by the administrative officials, the courts below rejected their determination because "the moving cause for the selection of the park as the site for the Federal building" was the proposed agreement to exchange the park property for the present federal building and the land on which it is located (R. 658). The court points out that prior

to the institution of the condemnation proceeding, certain agents of the Public Works Administrator and officers of Cape Girardeau contracted to exchange the property condemned for the old federal building, and that when it developed that the "City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract" this suit was instituted "as a means for accomplishing indirectly an exchange of properties which could not be directly made" (R. 658).

The Mayor and the City Council proposed the exchange and have repeatedly given it their full support (R. 18–21, 63–76, 92–93, 162–165, 175–176, 417–434, 620). The exchange is classed by them as being "to the best interest of the City" (R. 19, 73, 418). The City Attorney actively favors the exchange (R. 620). The majority of the qualified voters in the city, being fully apprised of the provisions with respect to the library, approved it (R. 349–350, 421–433, 509). It is approved by an impressive number of businessmen in the city (R. 176, 188, 199–201), and by the local postmaster who has no financial or personal interest in any of the locations (R. 176, 189). The exchange will save the city "a large sum of money" (R. 178, 188, 190, 424, 497, 555). It is undisputed that the building which now houses the Court of Common Pleas of Cape Girardeau County and the offices of various city officials lacks quality of design and "has been so

devoured by termites [that] the floors are propped up by struts and timber braces, to prevent them from falling through at possible cost of life" (R. 553). The City's interest will be served by acquiring the old federal building and provision is made for the uninterrupted administration of the Court of Common Pleas (R. 63–65, 67, 80, 92).[16] The exchange will also save the United States a substantial sum of money, because the present post office building is a one-purpose structure with little value for commercial purposes so that "no other acceptable offer for an exchange or sale of the present government property is securable" (R. 176, 497, 519, 555). The present building cannot be used in connection with a new building, yet to tear it down and build another on that site is regarded by all as a "ruthless destruction of valuable property" (R. 178, 555–556), and the United States would have to secure temporary quarters for the post office and other federal agencies located there (R. 178). The park site would provide an attractive setting for the new federal building which is to be "a thing of beauty and a practical utility" (R. 132, 145, 176, 189). The site is easily accessible (R. 144, 364–365).

[16] The finding of the trial court (R. 630) that local governmental functions "would be interfered with" apparently refers simply to the inconvenience of moving. That is the only basis for the finding since there was no evidence or finding that the old federal building would be inadequate for purposes of the local government.

Thus, such an exchange would be mutually beneficial and effect a monetary saving both to the City and the Federal Government. These financial elements were factors that were properly considered by the administrative officials in making their selection. Indeed, a consideration of the relative costs was a matter that was essential to an intelligent choice. This Court said in *United States* ex rel. *T. V. A.* v. *Welch*, October Term, 1945, Nos. 528–533, slip opinion, pp. 6–7:

> Neither the fact that the authority wanted to prevent a waste of government funds, nor that it intended to cooperate with the National Park Commission detracted from its power to condemn granted by the Act. The cost of public projects is a relevant element in all of them, and the government, just as anyone else, is not required to proceed oblivious to elements of cost. Cf. *Old Dominion Co.* v. *United States, supra* [269 U. S. 55, 56]. And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public. *Brown* v. *United States*, 263 U. S. 78.

Consideration of an exchange does not, therefore, constitute a basis for a conclusion that the selection was arbitrary and capricious. Nor does the assertion of the court below (R. 658) that these condemnation proceedings were instituted as a means of accomplishing indirectly an exchange which

could not be made directly tend to support a conclusion that the administrative action was arbitrary or capricious. If this reasoning were valid, it would mean that condemnation, which is always an alternative for direct purchase, is always arbitrary and capricious.

Moreover, there is no evidence that selection of the park site was conditioned upon the legal right of the city to convey it voluntarily. On the contrary, the record abounds with undisputed evidence that the Joint Committee was informed, prior to its recommendation of April 7, 1941 (R. 191), that the Government could not be assured a valid title to the city property except by condemnation. The report of M. J. Deutsch, Site Inspector for the Post Office Department, to the Joint Committee, dated August 20, 1940, stated that (R. 190): "The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade." The letter by defendant's counsel, I. R. Kelso, to Mayor Statler, dated August 10, 1940, which was included in the Deutsch report, stated that "the government, upon investigation, might decide that the Mayor and Commissioners do not have the legal right to dispose of the Courthouse park and City Hall and Common Pleas Court Building" (R. 189, 198, 203). In addition, I. R.

Kelso appeared before the Joint Committee on or about September 30, 1940, and outlined in detail the reasons in law why the city lacked power to make a valid conveyance (R. 481–482). The report of H. Arthur Tucker, architect for the Federal Works Agency, to the Joint Committee, dated October 9, 1940, stated (R. 554): "The legal right of the city officials to deed any part of the park to the Government to use, is questioned by some people in Cape Girardeau." The Site Proposal form submitted to all bidders and upon which the city made its original offer of November 26, 1940, which the Government accepted on May 26, 1941, contained two paragraphs *specifically providing for condemnation* (R. 63, 65, 70, 71). The letter of the Acting Administrator of the Federal Works Agency to the Attorney General, dated September 25, 1941, requesting the institution of condemnation proceedings, stated (R. 59): "This Agency has endeavored, without success, to acquire title to the land by voluntary conveyance." All this evidence was before the Postmaster General and the Administrator of the Federal Works Agency when they approved the selection of the Joint Committee on June 10, 1943 (R. 86–87, 536).

Whether the local authorities had the power to accomplish the exchange is not, of course, an issue in the instant case, in which there is no attempt to enforce a voluntary transfer. The city, like any other holder of a base fee, once condemnation proceedings

have been instituted, may stipulate for and receive compensation for the absolute fee. *People of Puerto Rico* v. *United States*, 132 F. 2d 220 (C. C. A. 1), certiorari denied, 319 U. S. 752. And no reason is suggested why the local government does not have power to settle its claim by accepting substitution—the best way of adjusting compensation in such cases. Cf. *Brown* v. *United States*, 263 U. S. 78; *Dohany* v. *Rogers*, 281 U. S. 362; *United States* v. *Miller*, 317 U. S. 369; *United States* ex rel. *T. V. A.* v. *Welch*, October Term, 1945, Nos. 528–533; *Jefferson County, Etc.* v. *Tennessee Valley Authority*, 146 F. 2d 564 (C. C. A. 6), certiorari denied, 324 U. S. 871. The Federal officials have statutory authority to dispose of the old post office building (40 U. S. C. 345 (b)), but if for any reason the city could not accept the federal property in payment, then the selecting officials could re-examine the suitability of the site and either pay the amount of the money award, $430,000 being available for the project (R. 83, 294), or abandon the proceedings entirely. *Danforth* v. *United States*, 308 U. S. 271, 284; *Barnidge* v. *United States*, 101 F. 2d 295, 298 (C. C. A. 8).[17]

[17] The statement of the court below that the local officials lacked authority to accomplish the exchange (R. 658) is, at best, questionable. Under its general power to acquire and hold property and to settle litigation, it would seem that the city may legally make the exchange (see R. 111). In 1820, the heirs of Louis Lorimier quitclaimed to the Town of Cape Girardeau several tracts for particular public uses, and other tracts, including the one involved here, without mentioning

In the light of the foregoing (*supra*, pp. 37–44), it cannot be said that the administrative officials acted "arbitrarily and capriciously" in selecting this particular site. There were sound reasons for the selection which they made. They considered and evaluated the relative interests of all parties concerned—the Federal Government, the local government, and the citizenry of the municipality. The mere fact that the court was of the opinion that some other site might do equally well or even better is beside the point, since Congress has conferred upon the administrative of-

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a specific public use, the land to "remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property" (R. 106–107). The decision in *Board of Regents for Normal School District No. 3* v. *Painter*, 102 Mo. 464, 14 S. W. 938, 940, relied upon by the court below, related to one of the tracts included in the same deed as to which the use was specifically restricted to school purposes. The Missouri court held that a normal school was not a public school and hence not within the meaning of the terms of the grant, and that, therefore, the city could not convey the lot there involved for its establishment. Since the parcel here involved was not dedicated to a specific, limited or defined purpose, the case is not controlling. The Federal Post Office and Court House would certainly constitute a public use and the property exchanged will also be used for public purposes. It seems probable that, under the circumstances of this case, which show that the exchange is to the advantage of the city and will carry out the purposes expressed by the grantor, the Missouri courts would not hold it void. Cf. *Woodville, Oklahoma* v. *United States*, 152 F. 2d 735 (C. C. A. 10), certiorari denied, October Term 1945, Nos. 1022–1023; *United States* v. *302 Acres of Land, More or Less, Etc.*, 51 F. Supp. 56, 60–61 (S. D. N. Y.).

ficers and not the courts the duty of selecting the city and site for these buildings, and the availability of other sites does not of itself indicate arbitrary or capricious action. *United States* v. *Certain Parcels of Land,* 30 F. Supp. 372, 379 (D. Md.).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court below should be reversed.

Respectfully submitted.

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Solicitor General.
DAVID L. BAZELON,
Assistant Attorney General.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ISKA W. CARMACK,
Respondent.

No. [redacted] 40

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION THERETO.

HOMER HALL,
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St. Louis 1, Mo.

ROBT. D. ABBOTT,
506 Olive St.,
St. Louis 1, Mo.

I. R. KELSO,
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Cape Girardeau, Mo.

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Counsel for Respondent.

DUNCAN & BRENNER, PRINTERS, ST. LOUIS

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The law to be applied to the facts in this case, is the law of the State of Missouri as declared by the Supreme Court of Missouri with respect to the power of the City to exchange or convey the property here involved.

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The opinion of the Supreme Court of the State of Missouri construing the deed from the Lorimer heirs of September 11, 1820, relied upon by the United States in this case, is, therefore, for convenience and ease of reference printed in full in the Appendix 10a

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ISKA W. CARMACK,
Respondent.

No. 812.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION THERETO.

PRELIMINARY STATEMENT.

Counsel for Respondent are not satisfied with the statement of facts presented by the Petitioner and are, therefore, submitting what we consider a more accurate and complete statement of facts contained in the voluminous record in this case.

STATEMENT OF THE CASE.

A Stipulation of an Agreed Statement of Facts was offered in evidence in its entirety on the trial of this cause

and is hereinafter frequently referred to both in the Statement of the Case and the Argument. That Stipulation (R. 157-166) is printed in the Appendix, Pages 1a-10a. Petitioner has ignored the Stipulation of Agreed Facts above mentioned in its Petition for Writ of Certiorari.

The undisputed facts disclosed by the record, which Respondent believes fully support and establish the correctness of the opinion and decision of the Circuit Court of Appeals, may be grouped under the following headings:

1. Present Public Uses of Proposed Site.
2. Destruction of Existing Public Uses would be Inevitable.
3. Exchange of Property is the Basis of This Suit and Required Dismissal of Condemnation Petition.
4. The Record Shows That the Site Which Government Officers Selected would Not Provide Suitable Accommodations for Courthouse, Post Office and Custom House as Required by Act of Congress of May 25, 1926, Cited and Relied Upon by Petitioner.
5. Government's Only Site Agent Recommended Selection of a Different Site.

1. Present Public Uses Of Proposed Site.

Item II. of the Stipulation of Agreed Statement of Facts (R. 158, 160) (Appendix Pages 2a-4a) fully describes the present public uses of the property sought to be condemned.

The Stipulation is approved by Harry J. McNerney, Attorney for the Federal Works Agency. Mr. McNerney was called as a witness in this case by the Government. He stated he is Special Assistant General Counsel for the Federal Works Agency and assisted in preparing that Stipulation (R. 157-166) (Appendix Pages 10a).

Referring to the contents of that Stipulation, which sets forth the basis upon which the selection of the site was made in this case, Mr. McNerney testified:

> "The Court: *Were there material matters before the Department on which they based a decision that are not in that agreed statement of facts or stipulation?*

A. *Not to my knowledge.* (Emphasis added.)

"The Court: Is it your knowledge from an examination of the files in the Department with which you are connected that this stipulation that you entered into covers material facts upon which the Department based its decision?

"A. That is right." (R. 541-542.)

The present public uses of the proposed site are fully and adequately stated in the opinion of the Circuit Court of Appeals, as follows:

> "The land sought to be taken by the United States was conveyed to the inhabitants of the Town of Cape Girardeau, predecessor of the City of Cape Girardeau, in 1820 to be held forever by the grantees as a public park for the use and benefit of the inhabitants of the town and the owners of adjacent lots. The City of Cape Girardeau has no power to convey any part of the public park nor to devote it to any use other than that specified in the deed under which it has been held by the City and its predecessor for more than a century. Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, 940; Carmack v. United States, supra (135 F. 2d 196). That part of the park now sought to be condemned is occupied by the public library building of Cape Girardeau and by the local courthouse. The entire second floor of the court house is used by the court of common pleas, a court of record with jurisdiction in civil and criminal matters. The first floor is occupied by the offices of the City of Cape Girardeau, including the mayor, city engineer, city clerk, city council, and city attorney, and also by the clerk of the court of common pleas. The basement of the building is used largely for storage space for the files and records of the common pleas court. The library building is used as a meeting place for all local civic organizations. The property described in the Government's petition for condemnation is a tract measuring 280 x 240 feet near the center of the park." (R. 660, 661.)

The record shows that the evidence on the second trial as to the present public use of the *particular* land described

in Petitioner's Second Amended Petition in condemnation, as above quoted, is the same as the evidence on the first trial (135 F. 2d. 196, l. c. 198) and is the identical property described in Item II. of the said Stipulation of Agreed Facts (R. 159, 160). (Appendix Pages 2a-4a.)

At Page 200 of the first opinion in this case, (135 F. 2d. 196-200), the Court said:

> "The record shows without dispute that the property has been devoted to public use, not only because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose."

2. Destruction of Existing Public Uses would be Inevitable.

In affirming the judgment of the District Court on the second trial, the Court below correctly stated the facts shown by the records, as follows:

> "The District Court found on substantial evidence that taking by the Government of that part of the park sought to be condemned would result in the destruction of the use of the remainder of the tract as a park; would require the wrecking of the common pleas court building and the removal of the public library building and a public monument; and would materially interfere with the proceedings of the court of common pleas and with the transaction of city business in the courthouse building, and also with the plans for a civic center prepared by an expert employed by the local chamber of commerce for that purpose. The court also found that there was no necessity for the taking of the land described in the petition for condemnation; that other sites in the City of Cape Girardeau were available for the proposed Federal Project; that the failure to secure the land in this proceeding would not result in the failure of the Federal project; and that the park was not selected by the Federal Works Administrator and the Postmaster General as a site for the Federal building upon considerations of Federal necessity or advantage, but because of the erroneous belief of

these Federal Agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated.

"We cannot say that any of these findings of fact by the District Court are clearly erroneous. On the contrary, each of them was, in our opinion, required by the evidence. By this evidence it was shown that the United States owned a postoffice, courthouse, and customhouse building in the City of Cape Girardeau, located on the most prominent corner of the city, opposite the leading hotels, convenient to the largest patrons of the postoffice, and nearer the center of free mail delivery in the City than any other available location. It further appears that adjoining the site on which the present Federal building stands are tracts of land which the United States may acquire by purchase or condemnation at reasonable cost, and which, together with the site presently owned by the United States, affords sufficient area for any necessary additions to the present building as well as for the construction of a new building. The site now owned by the United States, together with the adjoining available tracts, was selected by the only representative of the Postoffice Department and the Federal Works Agency who made a study of the relative merits of available sites in Cape Girardeau as the most desirable from the standpoint of the United States." (R. 661, 662) (151 F. 2d. 881, 882.)

In this connection it should be noted that the Public Library site was not understood by the Committee to be included in the negotiations for exchange of property. Mr. Meyers, Fourth Assistant Postmaster General, in referring to this matter testified, in part, as follows:

"Q. Do you know whether the original plan for the condemnation of a part of the Park and courthouse *contemplated the condemnation of the site of the Public Library Building?*

A. *My recollection is that it didn't contemplate the condemnation of the Public Library site.*" (R. 137)

Louis Hecht, a prominent merchant on Main Street at Cape Girardeau, and the owner of some ten store buildings on Main Street, in referring to the condemnation of the Library site and building, testified, in part, as follows:

"Q. When did you first learn from any source that the Public Library Building was included in this condemnation? * * * *

A. When I first learned that the library is included in the condemnation proceedings?

Q. Yes, sir.

A. *I never knew that the library was included. I have always been under the impression that if the post office is located where the court house is now that it would not affect the library, that the library would not be affected in any way, it would be left as it is.*" (R. 249)

The Stipulation of Agreed Facts—Item IV.—referring to Public Library and Public Library Building, a part of property sought to be condemned, contains the following statement:

"It is agreed by and between the parties hereto that there is now and has been for many years past continuously maintained a public library building in which the said City of Cape Girardeau, Missouri, now and for many years past has continuously maintained a public library for the general public, both as a public library and also additionally as a meeting place for civic organizations such as garden clubs, rose societies, historic societies, and other civic and public gatherings." (R. 157, 160)

Undoubtedly referring to a referendum petition signed by over 2000 citizens of Cape Girardeau protesting against an exchange of property (R. 444), in addition to the protests set out in the Report and Recommendations of M. J. Deutsch, the Government's only Site Agent, (R. 167-204) said Report states:

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. The president of the Chamber of Commerce decided not to give an opinion as to his preference.

"The postmaster, who has no financial or personal interest in any of the locations, but who is conscientiously interested in civic development, *regards the government-owned site as an outstanding location but recommends the city park* as first choice because *this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings.* As a second choice, *in the event that a trade with the city is not feasible, the postmaster prefers the present government-owned site.*" (R. 188, 189) (Emphasis added.)

The Deutsch Report and Recommendations closes with this recommendation:

"*For First Choice* I recommend that the present government-owned site be retained and that the adjoining property, Site 2 offered by H. Bremermann, be purchased for $15,000, and that a counter offer be made to the owner of Site 3, Ella M. Drum, to purchase this site for $600.

"This recommendation is made because it is believed that the present location *is the most outstanding site in* this city, and because of the *numerous limitations on all of the other competing sites* which would prevent an advantageous or desirable transaction." (R. 189) (Emphasis added.)

3. Exchange of Property is the basis of this suit and required Dismissal of the Condemnation Petition.

In referring to the basis of this suit, the Court below correctly stated the undisputed facts in this record, as follows:

"The evidence also established that, prior to the institution of the condemnation proceeding, certain agents of the Public Works Administrator and officers of Cape Girardeau had conceived the idea of an exchange of the park property for the present Federal

building and the land on which it is situated, and that negotiations between them to that end had culminated in the proposed agreement between them for the exchange of property. As stated above, this proposed agreement was the moving cause for the selection of the park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. This exchange was to be consummated eventually by the acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings. The facts set out above are sufficient, we think, to distinguish this case from C. M. Patten and Co. v. United States, 9 Cir. 61 F.2d 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372, and like decisions.

"The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in Oklahoma v. Atkinson Co., 313 U.S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F.2d 636, 639. For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, par. 301-303, effective July 1, 1939, 53 Stat. 1426, 1427; 40 U.S. C.A., par. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise in the District of Columbia and in the several States sites and additions to sites, and cause to be constructed thereon adequate and suitable buildings for the accommodation of various departments of the Government. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erec-

tion of buildings to be used by the United States for postoffices, courthouses, and customhouses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions." (R. 662, 663) (151 F. 2d 881, 883.)

Walter F. Meyers, Fourth Assistant Postmaster General, testified on behalf of the Government in part, on examination by the Court, as follows:

"The Court: Did you reach your conclusion on the theory the City would convey title to this land?

"A. Yes, sir; I read the cases that had been presented, and I was of the opinion that the opposing view was not correct. I had practiced law for thirty years myself and thought that might mean a little something." (R. 131)

The Stipulation of Agreed Facts expressly recites that the authority of the City Officials to enter into the agreement for an exchange of properties is based upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362 Revised Statutes of Missouri, 1939).

Item VI. of the Stipulation of Agreed Facts reads, as follows:

"Item VI. Agreement to Exchange Property.

"That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government *for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange* for the old United States Post Office Building located in said City of Cape Girardeau, Missouri;

"That said City Officials claimed and represented that they based their authority to sell or dispose property upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362 of the Revised Statutes of Missouri, 1939).

"That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America *for the exchange* of the old Post Office Building and site for the property sought to be condemned *is based upon said representations as to the right and authority of the City Officials to sell or dispose property under said Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362 of the Revised Statutes of Missouri, 1939)*" (R. 162, 163) (Emphasis added.)

The sections of the Missouri Statutes relied upon, as hereinabove referred to, read as follows:

"Sec. 7361. May Sell And Convey Commons.—Where any city, town or village in this state hath a common annexed to it, the trustees or body corporate of said city, town or village shall have authority to sell or convey, by deed in fee simple, all the common annexed to said city, town or village. (R. S. 1929, Sec. 7210.)

"Sec. 7362. May Pass Ordinance And Perform Other Acts Necesary To Effect Sale.—The trustees, or body corporate, of said city, town or village, is hereby given full power and authority to pass any laws, by-laws, ordinance or other necessary provisions regulating and effecting the sale of said commons, or to perform, or cause to be performed, all acts that are, or may become, necessary to carry into full effect the sale of said commons by said city, town or village. (R. S. 1929, Sec. 7211.)"

Other evidence in the record showing that the purpose of the condemnation proceedings was to effect an exchange of properties is set out and discussed in the argument.

4. The record shows that the site which Government officers selected would not provide suitable accommodations for Courthouse, Post Office and Custom House as required by Act of May 25, 1926, cited and relied upon by Petitioner.

The Statute of May 25, 1926, which Petitioner cites and relies upon as the Statute Involved (Petition p. 3) was enacted, "To enable the Federal Works Administrator to provide suitable accommodations * * * for court houses, post offices, immigration stations, custom houses * * *," and the record in this case shows that the land sought to be condemned would not "provide suitable accommodations" for the Federal courthouse, post office and custom house at Cape Girardeau, and the decision of the Circuit Court of Appeals was not only authorized but was required by the statute and the undisputed facts in the record.

The Government architect Hart showed the lack of availability of the land in question when he testified:

> "Q. You made the statement a little while ago that all that would be left on the east side of the building would be terraces. *Aren't all those terraces included in the Government acquisition down to Spanish Street?*
>
> *A. No, sir, the new property comes up to the terraces. The terraces are out beyond.* The property lines come about to here. The terraces are down beyond that; (Indicating)." (R. 369.)

It is conceded in this record that the description of the land in question referred to by the witness Hart, is accurately described with respect to its elevation and boundaries as set out in the opinion by the District Judge, (55 F. Supp. 555, 556) as follows:

> "The Park is bounded on the east by Spanish Street. Spanish Street is 40 ft. below the level of the proposed site. To go from Spanish Street to the proposed site it is necessary to ascend approximately 60 steps. The east line of the proposed building site is near the top step, leaving approximately 100 feet between the east line of the proposed site and the east line of the Park site. These strips of land thus remaining on the north, east and west outside of the boundary lines of the pro-

posed site are not sought by plaintiff and are to remain Park property. (See Gov. Exhibit No. 5.)" (United States Exhibit 5, R. 88, 89, and United States Exhibit 11, R. 498, 499.)

The Report and Recommendations of Deutsch (the Government's only Site Agent) show the "disadvantages" of the *particular* land in question in the following language:

> "This location is somewhat removed from the center of carrier delivery and the center of population, and *is definitely not in the trend of future business expansion or growth.* A new building here would face a side street with only residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, *it may be necessary to forego advantages, with respect to necessary approaches and driveways.*" (R. 177.) (Emphasis added.)

Comparing the particular land described in the petition with other sites, the Report and Recommendations of the Government's only Site Agent concludes:

> "*It is my opinion that the present Government-owned site and adjoining ground is the most outstanding location in the city. Any of the other sites would be merely a compromise to avoid the demolition of the present federal building. While due regard must be given to public sentiment, it is obvious that the city park site, while it might provide an attractive setting, would present a problem to develop for practical utilization.* The third choice would make a fairly suitable site, especially in the event that the present federal building would remain, but the lack of a bid from Miss Greene and the sentiment in her favor against condemnation is a serious obstacle." (R. 185.) (Emphasis added.)

As to the site recommended by the Government's only Site Agent as "First Choice", in preference to the particular land sought to be condemned, the Deutsch Report and Recommendation states:

> "This (present Post Office site) is an excellent corner location facing the most prominent intersection in the

city and on the principal business street. The center of the business section is not definitely ascertainable because of the diversion caused by the three business sections, but this corner is generally regarded as being the center of the business district. This location is about two blocks north and three blocks east of what might be designated as the center of delivery and the approximate center of population. It is directly across the street from the bus depot, the largest office building in the town, and the two principal hotels which are convenient for sessions of the Federal Court.

"The location is also conveniently situated with regard to the Southeast Missourian Publishing Company and the Missouri Utilities Company, two of the largest mailers in the city. Regardless of the fact that the trend of the business district is toward the west on Broadway, this would remain the principal and the most prominent intersection because of the character of the buildings now standing. The purchase price of the Bremermann property is reasonable, and the strip owned by Drum can no doubt be purchased for approximately $600." (R. 177-178.)

The record shows that the only investigation or consideration of the suitability of the land in question as an available, suitable and fitted site was the investigation and recommendation made by M. J. Deutsch, the Government's only Site Agent. Bearing on the selection and character of the land in question, we here call attention to the following undisputed evidence in this record.

Walter Meyers, Fourth Assistant Postmaster General, testified, on cross-examination, as follows:

"Q. Now was there any information assembled with respect to the selection of a site for the post office at Cape Girardeau after the suit had been reversed by the Circuit Court of Appeals in this proceeding?

A. Not that I know of." • • • (R. 136.)

Mr. Meyers further testified:

"Q. And your files, to your knowledge, have no papers of any kind showing any action taken by Postmaster-General Walker in his capacity as Postmaster-

General prior to the signing of this paper (Government Exhibit 4) on June 10, 1943?

A. I think that is correct.

Q. And that is also true of General Fleming?

A. I don't know, but I assume so.

Q. Do you know whether there was any information furnished to the Postmaster-General or the Administrator of Public Works Agency, in the form of a plat showing the property sought to be condemned in this proceeding, before the architect H. A. Tucker visited Cape Girardeau?

A. I don't know.

Q. Do you know whether the original plan for the condemnation of a part of the Park and court house *contemplated the condemnation of the site of the Public Library Building?*

A. *My recollection is that it didn't contemplate the* condemnation of the Public Library site." * * * (R. 137.)

As hereinabove set out under Subdivision 3 of this statement, Mr. Meyers testified that his Committee reached its conclusion regarding the exchange of property on the theory the City would convey title to this land. The Government not only fails to consider but wholly ignores the Stipulation of Agreed Facts, Report and Recommendations of the Government's only Site Agent, and all other facts in this record, which conclusively show that the site selected is not available, suitable and fitted for the Post Office site.

The record clearly shows that Fourth Assistant Postmaster-General Meyers was mistaken in testifying that Mr. M. J. Deutsch was not the only Government Inspector to make an examination of the sites at Cape Girardeau and recommendations to the Joint Committee.

On cross-examination, Mr. Meyers testified:

"Q. Now the Government's only site investigator in this case was Post Office Inspector M. J. Deutsch?

A. No, that is not correct. Mr. Betterly came out to go over this matter, Mr. Witman came out, and two architects came out to go over it." (R. 128.)

Mr. J. F. Betterley, referred to by the Fourth Assistant Postmaster-General as one of the persons investigating the site, testified that he never at any time acted in the capacity of a Site Agent. Note the following question and answer by Mr. Betterley in this connection:

"Q. And you made no record for the Committee?
"A. That is right." (R. 354.)

The testimony of E. R. Witman, referred to in Mr. Meyers' testimony, showed that he was Fiscal Manager and had nothing to do with the inspection of Post office sites.

The Stipulation of Agreed Statement of Facts shows that H. S. Roome prepared the form of proposal for the exchange of properties, but made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for the Post Office. (R. 163, 164) (Item IX, Stipulation of Agreed Facts, Appendix, Pages 7a, 8a.)

The Stipulation of Agreed Facts further shows that H. A. Tucker, referred to by the Fourth Assistant Postmaster-General as making an investigation of the sites at Cape Girardeau, had no authority and was given no instructions to make investigation of sites at Cape Girardeau, and had no authority to make any recommendations to the Joint Committee regarding the selection of a site at Cape Girardeau, and in fact made none. (R. 163) (Item VIII, Stipulation of Agreed Facts, Appendix, Page 7a.)

The lack of information on the part of the agents of the Government regarding the physical facts at the Court House site is disclosed on the cross-examination of R. S. Hart, (one of the architects referred to by the Fourth Assistant Postmaster-General), as follows:

"By Mr. Hasson:

Q. Mr. Hart, you stated your duties were to go down there and locate the building on the site that was to be secured for this particular site. *Did you have anything to do with recommending the site for selection by the Postmaster-General and the Federal Works Administrator?*

A. No, sir."

5. Government's only Site Agent recommended selection of a different Site.

The Stipulation of Agreed Facts in this record shows:

That Post Office Inspector, M. J. Deutsch, was designated as the Government's only Site Agent to visit the City of Cape Girardeau, for the purpose of investigating and recommending to the Joint Committee considering the selection of the Post Office, Custom House and Federal Court Building site at Cape Girardeau, an available, suitable and fitted site for the construction and maintenance of such Building at Cape Girardeau;

That the said Post Office Inspector, M. J. Deutsch, did, after considering the facts pertinent to the site selection for the construction and maintenance of a Post Office, Custom House and Federal Court Building at Cape Girardeau, make a report to said Joint Committee wherein he, as the Government's only Site Agent, recommended as his First Choice a site other than the public property sought to be condemned. (R. 158, 159, Item II.)

Bearing upon the question of suitability of site in question, we here call attention to Report and Recommendations of the Government's only Site Agent hereinabove quoted from his report (ante p. 12-13) of this Brief.

In the first opinion of the Circuit Court of Appeals, which was unanimous, the Court found in favor of this Respondent and against the Petitioner herein. On remand the trial Court found all of the issues in favor of this Respondent and against Petitioner herein. The Petitioner appealed from that judgment and the Court below, in a unanimous opinion, affirmed the judgment of the District Court, and Petitioner now asks this Court for a writ of certiorari to review the undisputed facts in this record for the fourth time.

ARGUMENT.

I.

The matters at issue in the within cause were correctly decided by the Circuit Court of Appeals when it affirmed the judgment of the District Court in favor of Respondent and against the Petitioner, on the ground that the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 1427, Title 40 U.S.C.A., under the record in this case, did not confer upon the Public Works Administrator and the Postmaster General the power asserted in this case by Petitioner to condemn the particular land in question.

While the Petitioner contends that, although the Circuit Court of Appeals states that it did not consider or pass upon the question whether the action of the Government officials was capricious or arbitrary, yet the Petitioner devotes a large portion of the Petition to the contention that the opinion of the Circuit Court of Appeals is based upon that question, and the Respondent believes that if the opinion of the Court of Appeals be considered as based on that issue, the record in this case fully supports the conclusion that the action of the Federal officials was arbitrary and capricious, as was found by the District Court, and the Respondent is willing to have this question now before the Court considered on that basis.

The Act of May 25, 1926, cited and relied upon by Petitioner, provides, in part:

> "To enable the Federal Works Administrator to provide *suitable accommodations* * * *, courthouses, post offices * * *, and other public buildings of the classes under the control of the Federal Works Agency in the states, territories and possessions of the United States, he is hereby authorized and directed to acquire by purchase, condemnation or otherwise, such sites and additions to sites as he may deem necessary

> * * *. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Federal Works Administrator to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quit claim deed of conveyance: * * *" (Emphasis added)

In referring to this Statute, under the undisputed facts in this case, the Circuit Court of Appeals said:

> "* * * The facts set out above (in the opinion) are sufficient, we think, to distinguish this case from C. M. Patten and Co. v. United States, 9 Cir., 61 F. 2d 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372, and like decisions."

Continuing the reference to the lack of authority to condemn, under the record in this case, the Court (R. 663) said:

> "The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534; *State of Minnesota* v. *United States*, 8 Cir., 125 F. 2d 636, 639. For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, Secs. 301-303, effective July 1, 1939, 53 Stat. 1246, 1427; 40 U. S. C. A., Sec. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise in the District of Columbia and in the several states sites and additions to sites, and cause to be constructed thereon adequate and suitable buildings for the accommodation of various departments of the Government. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States

for postoffices, courthouses, and customhouses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for the specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions.

"If the Act relied on by the United States should be held to confer upon the Public Works Administrator and the Postmaster General the power asserted in this case, it would subject the States and their political subdivisions to an interference with necessary local governmental functions at the decision of Federal administrative officials, with possible unfortunate and unnecessary conflicts between State and Federal authority. We find no basis in the Act relied on by the Government for attributing to Congress any such intent." (R. 663, 664.)

II.

Petitioner abandons the theory upon which it tried this case in the courts below in its Petition for Writ of Certiorari filed herein, and we respectfully submit it is without merit and should be denied.

Respondent will here discuss the three questions presented in the Petition (Petition p. 2) in the order there set out.

The first question presented by Petitioner reads as follows:

"1. Whether, under the statute authorizing the Federal Works Administrator, acting jointly with the Postmaster General, to condemn for post offices such sites 'as he may deem necessary,' a petition to condemn property already devoted to public use may properly be dismissed on the grounds that, in the opinion of the court, the selected site is not necessary for the public project because other sites are avail-

able, condemnation of the selected site will interfere with local governmental functions, and the property is held in trust for the specific purpose to which the land is being devoted."

This question ignores the Stipulation of Agreed Facts (R. 157, 160) (Appendix P. 1a-10a.)

The present public uses (referred to in Question 1) of proposed site are stated in the first opinion by the Circuit Court of Appeals in this case (135 F.2d 196, l.c. 198), and that is the identical description of present public uses of proposed site found in the Stipulation of Agreed Facts (Appendix p. 2a-4a). The court below also set out a full description of the present public uses of the proposed site in its opinion in this case (151 F.2d. 881-883). (R. 660, 661)

The second question presented by Petition (P. 2) reads as follows:

> "Whether, under the facts of this case and particularly in the light of the approval of local public officials and a majority of local voters, the selection as a site for a federal post office of property used for a city park and courthouse was arbitrary and capricious."

In the second question presented the Petitioner takes the position that the proposed exchange of properties prohibited by Missouri law is not arbitrary and capricious in the light of the approval of local public officials and a majority of local voters. The District Court in referring to the matter of local approval, said:

> "We note there was offered in evidence the proceedings leading up to and the holding of an election on the Park site. The evidence is of little value to the issues. Only one site was submitted to the voters and that was presented as a question of the City making the trade discussed heretofore. *Such procedure could not give legal effect to a transaction the City was powerless to perform.*" (55 Fed. Supp. 555-563.) (R. 600, 632) (Emphasis added.)

Furthermore, the record in this case reveals that there was a referendum petition signed by over 2000 citizens of Cape Girardeau protesting against proposed *exchange* of property (R. 444), in addition to the protest set out in the Deutsch Report and Recommendations.

The District Court, in referring to this matter, said:

> "* * * It is doubtful if any site is ever selected that is acceptable to all residents of any town or city. Certainly the evidence shows a *very sharp division of opinion in Cape Girardeau* on the selection of the site here under consideration. This has been the case from inception of the project and will, no doubt, continue to the end. * * *" (55 Fed. Supp. 555, 563.) (R. 600, 616.) (Emphasis added.)

The third question presented by Petitioner (P. 2) reads as follows:

> "Whether a taxpayer, property owner, and heir of the grantor to the city of the property sought to be condemned, has standing to object to the taking when she has no property interest in the land."

In the third question thus presented as to the right of Respondent to assert the defenses alleged in her answer, this matter was disposed of on the first appeal and accepted by Petitioner and is not now properly a question before this court. (Carmack v. United States, 135 F. 2d 196, l. c. 199.)

The position of Petitioner with respect to the issues involved and the procedure adopted after remand is set forth in a letter from Assistant Attorney General Littell, to the United States Attorney at St. Louis, Missouri, dated July 23, 1943, in which Mr. Littell, among other things, said:

> "You are advised that the Solicitor General has decided that application should not be made for a writ of Certiorari." * * * * (R. 94)

> "It will be recalled that the Circuit Court of Appeals held that right to determine what is a public use and when there is a public necessity for taking

specific property is, in the first instance, a legislative rather than a judicial question, but whether in carrying out the purpose of Congress the officer has acted capriciously or arbitrarily is a judicial question, and that this issue should have been determined by the District Court. This Department feels that this issue should be raised by the defendant, testimony taken if the Court desires it, and the question decided by the Court. It also appears to this Department that the best evidence to offset the contention that the selection was arbitrary or capricious is the report made by M. J. Deutsch, dated August 20, 1940." * * * * (R. 94, 95).

Let it be observed that on the second trial of this cause in the District Court the theory of the Petitioner as to the framing of the issues involved, and the taking of testimony, was adopted by the Petitioner. The second trial was conducted in all respects as directed by the Petitioner consistent with the first opinion of the Court of Appeals.

In the third question (Page 2 of petition) presented as to the right of Respondent Carmack to assert the defenses alleged in her answer, this matter was disposed of on the first appeal, and accepted by Petitioner and is not before this Court.

Carmack v. United States, 135 F. 2d. 196, l. c. 199;

Mott v. Morris, 249 Mo. 137; 155 S. W. 434, 438.

In support of the Respondent's above proposition we here call attention to the following authorities:

"Questions presented by a petition for certiorari should not be answered where based upon a state of facts not presented by the instant case."

General Talking Pictures Corporation v. Western Electric Company, 305 U. S. 124, 125; 83 L. Ed. 81, 82 (Headnote 1).

"It is elementary that the court is not bound to determine questions which have become academic."

"Ford Motor Company v. National Labor Relations Board, 305 U. S. 364, 375; 83 L. Ed. 221, 230, 231.

All proceedings on the second trial of this case after remand (R. 658) as stated in 151 F.2d. 881, are consistent with the first opinion of the Circuit Court of Appeals, remanding this cause for further proceedings consistent with that opinion. Carmack v. United States, 135 F. 2d 196. The Petitioner accepted the Findings of Fact stated in the first opinion of the Circuit Court of Appeals. (135 F.2d 196), and also accepted the law governing the right of the Government to condemn the particular property described in the condemnation petition in the circumstances presented in this case as declared by the Court of Appeals on the first appeal. (135 F.2d 196.) And Petitioner proceeded with the second trial of this cause in the District Court after remand (R. 600-618) reported in 55 Fed. Supp. 555, in a way entirely consistent with said opinion (135 F.2d 196), reversing and remanding this cause for further proceedings.

The specifications of errors to be urged by Petitioner (P. 9) are merely a restatement of the questions presented and are also void of merit. A discussion of the specifications of errors is merged in the discussion of the undisputed facts in this case and the law applicable thereto.

III.

The decision of the Circuit Court of Appeals that under undisputed facts in this record, the Act of Congress relied on by the Petitioner did not confer upon the Public Works Administrator and the Postmaster General the power asserted in this case, is not in conflict with the decisions of any other Circuit Court of Appeals, nor with any decision of this Court.

There is no conflict between the decision in this case and C. M. Patten and Co. v. United States, 9 Cir., 61 F. 2d. 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372, and like decisions.

The Petitioner contends that the decision of the Court below is in conflict with decisions of other Circuit Courts of Appeals and also in conflict with decisions of this Court governing the right of petitioner to condemn for a Post Office site the particular property involved in this case.

The facts in those cases were entirely different from the facts in this case. It is necessary for Respondent to call attention to the undisputed facts in this voluminous record which show conclusively that an illegal and void agreement for the *exchange* of properties is the basis of this suit.

The reason or excuse for selecting the site described in the Government's Petition for Condemnation is not based upon the merits or advantages of the particular land selected, but is bottomed entirely upon an *offer by the City Officials* for an *exchange* of property (R. 162) (Appendix P. 6a.)

The Court below in referring to this matter, among other things, said:

> "* * * As stated above, this proposed agreement (for an exchange of properties) was the moving cause for the selection of the Park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power, but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an *exchange* of properties which could not be directly made. This exchange was to be consummated eventually by the acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings." (United States v. Carmack, 151 F. 2d. 881, 883) (R. 662, 663.)

In referring to the authorities relied upon by Petitioner in the Court below and in this Court, the Court of Appeals said:

> "* * * The facts set out above are sufficient, we think, to distinguish this case from C. M. Patten and Co. v. United States, 9 Cir. 61 F. 2d. 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372, and like decisions.

"The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in Oklahoma v. Atkinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. 2d 636, 639. For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, par. 301-303, effective July 1, 1939, 53 Stat. 1426, 1427; 40 U. S. C. A., par. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise * * *. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of building * * *, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, *materially interfere with necessary local governmental functions.*" (United States v. Carmack, 151 F. 2d. 881, 883) (R. 663, 664). (Emphasis added.)

The first step in this proceeding was the letter dated November 26, 1940, from the Mayor of the City of Cape Girardeau, to the Commissioner of Public Buildings, Federal Works Agency, Washington, D. C., submitting a proposition for an *exchange* of the property involved in this proceeding for the present Post Office and Federal Court Building in the City of Cape Girardeau. (R. 76.)

The second step in this proceeding was a letter from Neal A. Melick, Acting Administrator of Public Buildings, Washington, D. C., dated May 26, 1941, accepting the proposition of the City of November 26, 1940, for an *exchange* of the property in controversy for the present Federal Building and site. (R. 63.)

The third step was a letter from John N. Edy, Acting Administrator, dated September 25, 1941, requesting the Attorney General to institute proceedings for the condemnation of the particular land, stating, among other things, that:

> "Under authority of the above cited legislation this Agency entered into a contract with the City of Cape Girardeau, Missouri, *for the exchange of the present Federal Building and site*, hereinafter described, for a tract of land as a new Post Office and Custom House site also hereinafter described." (R. 58) (Emphasis added.)

In referring to said letter signed by John N. Edy, Acting Administrator, Paul Emmert, Assistant General Counsel, Federal Works Administration, said:

> "He (John N. Edy) acted as indicated, that day he just happened to be the Acting Administrator that day and signed whatever papers were put on his desk for signature. Mr. Edy, in addition to his other duties acted as Administrator in the absence of the Administrator at that time." (R. 290.)

The fourth step was the letter from the Attorney General to the United States Attorney at St. Louis, dated October 16, 1941, which states that:

> "It is contemplated that compensation for the taking of the land shall be made by conveyance of the present federal building to the City of Cape Girardeau." • • • (R. 92.)

Walter F. Meyers, Fourth Assistant Postmaster-General, testified in the District Court, in part, on examination by the Court, as follows:

> "The Court: Did you reach your conclusion on the theory the City would convey title to this land?
>
> "A. Yes, sir; I read the cases that had been presented, and I was of the opinion that the opposing view was not correct. I had practiced law for thirty years myself and thought that might mean a little something." (R. 131.)

In this connection it should be borne in mind that neither the City Officials nor the Government Agents in their negotiations for an exchange of property contemplated the destruction of the Public Library building, which Petitioner now concedes must be removed by the city on thirty days notice. (Letter of Acting Commissioner of Public Buildings. (R. 63.) See also Appendix, 5a). In referring to this matter, the Fourth Assistant Postmaster-General testified, in part. as follows:

> "Q. Do you know whether the original plan for the condemnation of a part of the Park and court house *contemplated the condemnation of the site of the Public Library Building?*
>
> A. *My recollection is that it didn't contemplate the condemnation of the Public Library site.*" (R. 137.)

The record further discloses the fact that the architects in their report complained that the Public Library Building would detract from the new building proposed to be erected on the land in controversy. But in writing the contract for an *exchange* of properties a description of the real estate to be acquired included the land on which the Public Library Building is located. The plats of the Petitioner show that that land was included. (R. 77, 89, 499.)

In the light of the above facts we desire to call attention to the fact that the Petitioner in its brief at page 15 cites United States v. City of Tiffin, 190 Fed. 279 (C.C. N.D. Ohio) in support of the Petitioner's statement that:

> "The decision in the instant case stands alone in requiring specific Congressional authorization to condemn property already devoted to some public use when, in the court's opinion, the taking is not necessary, and in thus unnecessarily burdening the exercise of the sovereign power."

In the City of Tiffin case, supra, the Government sought to condemn a portion of a public alley for a post office site. The Court, at page 280, said:

> "The United States has paramount authority in the matter of taking any property within its borders for those public uses which are within the constitutional reservations to the general government."

But the Court further stated in the same paragraph, a principle overlooked by the Petitioner, as follows:

> *"This does not mean, however, that no power may intervene to prevent arbitrary action, for such power certainly abides with the courts."* (Emphasis ours)

In that case the trial Court was ruling on a demurrer to the petition. The concluding paragraph of the Opinion (190 Fed. loc. cit. 282) is as follows:

> "We believe that all there is in this case is for a determination by judicial consideration of the comparative importance of the contending public uses involving this plot of ground (In re Certain Land in Lawrence (D. C.) 119 Fed. 453), and that the demurrer should be overruled with exceptions."

In the Lawrence case, the Court (119 Fed., loc. cit. 456) said:

> "The legislature is the sufficient judge of the relative importance of the two uses. *If there is no express legislative provision, the relative importance of the two uses is to be determined by the Court.* If the later use is deemed by the Court, under all the circumstances, to be more important than the earlier, the land is taken for the later use without compensation for the loss of the earlier. If the earlier use is deemed the more important, the later is forbidden and the earlier continues.
>
> "We come next to the application of these principles to the facts of this case. There is here no express provision of the statute. I do not believe that the United States could, at its will, build this post office in the middle of the principal street of Lawrence or across the main line of an important railroad * * *. I doubt if it can be laid down, without qualification, that the public use of a post office is in all places superior to the public use of a park. That it is so in the case at bar appears probable from what appeared incidentally at the argument, but the issue was not then raised, and cannot be determined with-

out further hearing, if the City desires to be heard." (In re Certain Lands in Lawrence, 119 F. 453, l. c. 466). (Emphasis added.)

The Petitioner also on page 17 says, "Arbitrary or capricious means in bad faith or according to one's own will or pleasure, without adequate determining principle," and in a note cites several cases in support. Fox Film Corporation v. Trumbull, 7 F.2d. 715, 727, does not even remotely hold or imply that "arbitrary or capricious means in bad faith." The court in that case did, however, state a principle directly applicable and significant (page 728), as follows:

> *"If the commissioner * * * abuses his discretion, and acts in an arbitrary and capricious manner, and contrary to the plain intent of the statute, there remains the right to appeal to the courts which* exists under the general principles of jurisprudence. As was said in Bradley v. Richmond, 227 U. S. 477, 483, 33 S. Ct. 318, 320, 57 L. Ed. 603, 'there would, under general principles of jurisprudence, remain *the right to judicial review if the result should violate either a right secured under the law of the state or that of the United States'."* (Emphasis ours.)

The Court below said there is no conflict between C. M. Patten and Co. v. United States, 9 Cir. 61 F.2d, 970, and like decisions. In referring to the inherent right of the Government to condemn, the Court, in the C. M. Patten and Co. case, supra, at Page 972, said:

> *"However, this right of the Federal Government to condemn is subject to the power of the courts to intervene and prevent arbitrary and unnecessary action which must be determined by the facts in each particular case."* (Emphasis ours.)

In referring to the facts in the Patten case, the Court in that case further said:

> *"Recognizing, therefore, the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the*

Government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved." * * * * (Emphasis ours.)

The Court, in the Patten case, referring to the site involved in that case, further said:

"*The site involved possesses special and superior advantages as regards the government departments and the general public which no other available site affords,* as it is surrounded on three sides by public streets and on one side by a public park, and is a conspicuous site along the harbor channel in full view and touch with the harbor activities, enabling those concerned with government inspection of other governmental departments to gain prompt and convenient access to the federal building, such as immigration, quarantine, steamboat inspection, and customs. It is nearer the railway passenger station, street car and interurban lines, and the close railway tracks paralleling the plaza affords opportunity for the installation of a conveyor system by means of a subway and tunnel to transfer the mails to and from the railway mail cars and the post office, which is a saving in time and expense. *There appear other advantages* near the seat of operation *which the site has in the way of location* as regards *both governmental departments and the general public which are more necessary and a greater public use than a small part of a plaza.* This conclusion was reached by the trial court and is sustained by the weight of the evidence." (Emphasis ours.)

In referring to the site sought to be condemned in this case, the District Court (55 Fed. Supp. 562) (R. 615) said:

"Here a valuable city park and its present public uses will be destroyed if plaintiff condemns the park site. The City has given bond to remove by wrecking or otherwise, the present Common Pleas Court House, where Court is held; the building is also used

for the city government. Certainly during the course of construction of the new buildings, judicial administration will be affected. There appears to be no definite arrangements for the Court of Common Pleas insofar as this record is concerned. There is no suggestion for the future of the public library and the building in which it is located—other than removal of the building 'on thirty days notice'. There is no necessity for the destruction of these public services, conveniences and improvements. Necessity is not even claimed by the plaintiff."

The Courts below properly found that the facts in this record are sufficient to distinguish this case from the cases relied on by counsel for the Petitioner.

IV.

The record supports the finding of the District Court that the Administrator of Federal Works Agency and the Postmaster-General acted arbitrarily and capriciously in selecting the proposed site.

It is conceded in this record that no joint selection of the site in question had been made prior to the filing of the original Petition in Condemnation in this case. As a matter of fact, the record discloses that no joint selection was made until after the Court of Appeals reversed and remanded the cause on the first appeal. Carmack v. United States, 135 F. 2d 196. In referring to this matter, the District Court said:

"• • • Since the decision of the Court of Appeals, holding that proof of joint selection was a *jurisdictional* fact, the two public officers referred to have executed a site selection of the land described in the petition.

"There is no evidence that either the Postmaster General or the Administrator of the Federal Works Agency were ever informed or even now know that the site selection that bears their signatures (U. S. Ex. 4) describes land that is a public park or that the land was devoted to any public use—except for a 'library building'. As to the library building, they had no knowl-

edge as to its being subject to removal on thirty days' notice." (United States v. Certain Land, 55 Fed. Supp. 555, l. c. 557.) (R. 603.)

In United States v. 43,355 Square Feet of Land, 51 F. Supp. 905, in deciding that the property had been capriciously and arbitrarily selected, the court said (loc. cit. page 909):

> "In making these observations and stating these findings and conclusions the Court does not say or imply that any particular officer of the Government or any particular military man has gone out with a deliberate attempt to act facetiously with respect to the public generally. So far as I know each inspector and appraiser of this property may have done every act that he did in response to the order of some superior located in some other place.
>
> "The Court's conclusions relate to the situation *as a matter of law, not* as a matter of any express design going *to the question of proper, lawful or other kind of motives* of the particular official or military man who may have made an appraisal or an inspection or a report." (Emphasis added.)

At page 909 of the opinion in that case (51 F. Supp. 905) referring to the opinion of the Court in the Carmack Case, supra, (135 F. 2d, 196), the Court said:

> "(9) *This Court believes that the opinion of the Eighth Circuit Court of Appeals in that case applies to the situation in the case before the Court here, where the Government's position in effect is that, as to administrative acts of Government War Department officials under the Second War Powers Act, 50 U. S. C. A. Appendix Section 631 et seq., there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials.*" (Emphasis added.)

In Baisden v. Floyd County Board of Education, 270 Ky. 839, 110 S. W. (2d) 671, loc. cit. 673, the court, in referring to the duty to inquire as to whether the act of a Board was arbitrary, said:

> "While this court cannot question the motives of the Board in removing one who is delinquent in his statutory duties (Board of Education v. Stevens, supra), we can and will upon review inquire as to whether the act of the Board was arbitrary; we may determine what was right and equitable under the circumstances; whether the act was directed by reason and in good conscience. Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S. W. (2d) 356. *In its legal significance an act is arbitrary when it is done in an arbitrary or capricious way; without adequate determining principle; not founded in the nature of things.* King v. Falls County (Tex. Civ. App.) 42 S. W. (2d) 481. When we come to consider the action of the Board in removing appellant, we are forced to the conclusion that the removal was not based on sound reason or in the exercise of good judgment; it was neither right nor equitable, since we conclude that the reasons set forth in the affidavit and petition measure up to our idea of 'satisfactory' reasons for appellant's non-attendance at the three meetings." (Emphasis added.)

Respondent believes that this Court will give consideration to State Court decisions for in New York Rapid Transit Corp. v. City of New York, 303 U. S., 573, loc. cit. 593, in referring to the matter of construing a contract, the court said:

> "But, of course, in so doing we 'lean toward agreement with the courts of the State, and accept their judgments as to such matters unless manifestly wrong.'"

The District Court (R. 610) in discussing the position now taken by Petitioner in this case, (55 Fed. Supp. loc. cit. 560) said:

> "3. We conclude from this record that the plaintiff (Petitioner herein) concedes in this case that the selection of the site described in the petition, '*was on*

the basis of exchange of the present Federal Building and site thereof' for the city park site described in the petition, *as the result of the agreement between the city officials and the plaintiff.* In doing this did the Joint Committee base their act on a false premise, namely: a mistake of law; the law governing the right of the city to sell or exchange the whole or any part of the park site?"

The Court there quotes item VI. of the Agreed Statement of Facts, the agreement to exchange property. (R. 162.) (Appendix p. 6a.)

Again, at Page 561 of the Opinion, (55 Fed. Supp. 555, 568) the District Court (R. 613.) said:

"We believe the action of the Joint Committee, in the proceeding under a mistake of law, is decisive of this case adverse to the plaintiff, but we do not base our holding on that point alone.

"The cause must be considered under those rules of law applying to condemnation proceedings under a general act, which does not specify any certain property shall be condemned* * *."

The District Court (R. 615) also said: "Here a valuable city park and its present public uses will be destroyed if plaintiff condemns the park site. The city has given bond to remove by wrecking or otherwise, the present common pleas court house, where Court is held; the building is also used for the city government. Certainly during the course of construction of the new building, judicial administration will be affected. There appears to be no definite arrangements for the Court of Common Pleas in so far as this record is concerned. There is no suggestion for the future of the public library and the building in which it is located—other than removal of the building 'on thirty days notice'. There is no necessity for the destruction of these public services, conveniences and improvements. Necessity is not even claimed by the plaintiff. * * *

"Nowhere in the record do we find any claim by plaintiff that the site proposed is the only available property, reasonably fitted for the public project, or that failure to secure it would result in failure of the project.

"Upon the record this Court cannot find that the site described in the complaint is the only available property, reasonably fitted for the public project, when the plaintiff's own representative, chosen because of his knowledge and ability to select sites, has placed another site superior in desirability to the site sought. With this admission of plaintiff's representative this Court cannot find that the failure to secure the site described in the petition would result in failure of the public project. These facts support defendant's position in this case. Nor was there the slightest effort made in this case by the plaintiff to show a necessity for taking the particular property here involved, already devoted to a public purpose. On the contrary the evidence is undisputed and comes from an unimpeachable source, the government's witnesses, that there is no necessity for taking the particular property described in the petition. That another location is preferable is an unchallenged fact in this case. Consequently there can be no necessity by implication. Plaintiff proceeding under a general act, its case must fail for that reason also.

"The plaintiff is content, or rather forced to be, to rest its case solely upon the right of the city to sell or trade the park property, coupled with the rule that selection of the site by authorized officers carries an assumption that the decision was based on facts justifying the action taken, until the contrary be shown. The contrary has been shown in this case."

With respect to the contention of Petitioner that the Courts below passed upon the question of the good faith of the parties, we here call attention to the language of the District Court bearing on this question at Page 563 in this case, United States v. Certain Lands, etc., 55 Fed. Supp., 555, 563 R. 617.):

"* * * The city officials of Cape Girardeau, no doubt acting in perfect good faith, represented to plaintiff or the Joint Committee on site selection, that the city had a legal right to sell or exchange the park site. Also acting in perfect good faith the officials of plaintiff and the Joint Committee 'relied' upon the representations of the Cape Girardeau city officials as to their legal right to sell or exchange the park site, and the Joint Committee so relying, 'based' their decision as to site selection, upon such erroneous representation. The City of Cape Girardeau being without a legal right to sell or exchange the park property, as held by the Supreme Court of Missouri and in the opinion in this case by the Federal Court of Appeals, leaves the action of the Joint Committee in selecting the park site in the same status, as a matter of law, as if no exchange negotiations had taken place, and the plaintiff's officials had never been induced to consider the site upon the basis of the proposed exchange."

The District Court then cited the case of Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510, where this Court, at Page 69 of said opinion, held:

"It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise. * * * The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property."

The Circuit Court of Appeals, after reciting the facts in this record, said:

"As stated above, this proposed agreement (agreement for an exchange of properties) was the moving cause of the selection of the Park as the site for the Federal Building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the property, the present proceed-

ings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made." (United States v. Carmack, 151 Fed. 2d. 881, 883.) (R. 662)

V.

The City of Cape Girardeau Has No Authority To Contract to Convey Land Involved.

To show that the invalidity of the purported agreement is vital and very important in this case, we call the Court's attention to a case wherein the City of Kennett, Missouri, executed a contract with the United States which it had no authority to make under the laws of the State of Missouri, Ark.-Mo. Power Co. v. City of Kennett, Mo., 78 F.2d 911. In discussing the right of the defendant in that case to have a contract declared void, the court made the following statement (l.c. 922):

> "Revised Statutes of Missouri 1929, Sec. 2962 (now Revised Statutes of Missouri 1939, Sec. 3349), provides that no * * * city * * * or other municipal corporation shall make any contract unless the same shall be within the scope of its powers or be expressly authorized by law * * *. *The City derives none of its powers from the United States. It is a creature of the State of Missouri and has only such powers as the state has given it.* The relation of the United States to the City is no different than would be the relation to it of any individual, corporation, foreign state or foreign sovereignty which had made a similar arrangement for financing the City with respect to the construction of public works. If the City could lawfully enter into this agreement with the United States, we think it could lawfully have entered into a similar agreement with any entity having power to contract." (Emphasis added.)

Under the law as declared by the Supreme Court of Missouri, the alleged agreement between the officers of the United States and the officials of the City of Cape Girardeau offered in evidence in this case is worthless.

> Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464; 14 S. W. 938.

American Jurisprudence, Volume 18, paragraph 126, states the rule applicable to the facts in this case, as follows:

> "A municipal corporation cannot without express authority from the Legislature sell property which it holds for the use and benefit of the public at large."

The record in this case fully supports the finding of the District Court that the Government officials, in ignoring the decision of the Supreme Court of Missouri in the Painter case, supra, and the rule just stated acted arbitrarily without reasonable regard for the interests of the public at large and especially of the City and County of Cape Girardeau, and that the determination to select the Court House Park as a site for the new Post Office was made without considering the facts and without reference to the information which the investigation, report and recommendations made by the Government's only Site Agent so fully and clearly disclosed.

We believe it has been sufficiently shown by what has already been said herein that the law of the State of Missouri as stated in the Painter case, supra, is the law by which this case was rightly decided by the courts below, and that the action of the Government officers in wholly ignoring the decision in that case is arbitrary, capricious and unreasonable.

We call attention to a few of the decisions of the Courts of the United States which hold that the law of the State should be recognized and followed.

In Guy v. Utecht, Warden, 144 F. 2d 913, l. c. 915, the Court said:

> "The highest court of a state is the final arbiter of what the state law is, and when that court has spoken, its decision must be accepted by the federal courts as defining the law of the state. West v. American Telephone & Telegraph Co., 311 U. S. 223, 236, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956; Wichita Royalty Co. v. City National Bank of Wichita Falls, 306 U. S. 103, 107, 59 S. Ct. 420, 83 L. Ed. 515; Herzog v. Colpoys, App. D. C. 143 F. 2d 137, 138."

In Krauss v. Greenbarg, 137 F. 2d 569, the Court of Appeals, Third Circuit, at page 571 said:

> "However, as this Court has said many times since Erie Railroad Co. vs. Tompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, our duty is to apply state law as we find it in the state decisions irrespective of what we may regard as its merits."

In Charles Payton West and Maurice John West v. American Telephone and Telegraph Co., 311 U. S. 223, l. c. 236, 237, the Court said:

> "* * * the state 'laws' which, by Sec. 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, chap. 20, 28 U.S. C.A., Sec. 725, are made 'the rules of decision in trials at common law' define the nature and extent of petitioners' right. See Russell v. Todd, 309 U. S. 280, 289, 84 L.Ed. 754, 761, 60 S.Ct. 527. And the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute. Erie R. Co. v. Tompkins, supra (304 U. S. 78, 82 L.Ed. 1194, 58 S.Ct. 817, 114 A.L.R. 1487). True, as was intimated in the Erie R. Co. Case (304 U. S. 78), the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See Wichita Royalty Co. v. City Nat. Bank, 306 U.S. 103, 107, 83 L.Ed. 515, 517, 59 S.Ct. 420. But the obvious purpose of Sec. 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken."

In Palmer v. Hoffman, 318 U.S. 109, l.c. 118, the Court said:

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464; 14 S. W. 938, settles the question of Missouri law prohibiting the City Officials from entering into an agreement with the agents of the Government for an exchange of property. That opinion is printed in the Appendix, Pages 10a-15a.

VI.

The rule is also well settled that if the decision of the lower courts was correct the petition for writ of certiorari should be denied, even though the court below may have based its ruling upon a wrong ground or had not based its ruling on all the facts in the record which would have justified additional grounds for the decision.

In North American Acc. Ins. Co. v. Tebbs, 10 Cir. 107 F.2d 853, l.c. 856, the Court of Appeals held:

> "The trial court reached a correct result. The fact that he gave erroneous reasons therefor is immaterial. In the review of judicial proceedings if a decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In Helvering v. Gowran, 302 U. S. 238, l.c. 245, the Court said:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In Reconstruction Finance Corporation v. Goldberg, 143 F.2d 752, l.c. 756, the Court said:

> "Furthermore, even though the court had relied upon a wrong ground for its judgment, it must be affirmed if correct. Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed. 224; LeTulle v. Schofield, 308 U.S. 415, 421, 60 S.Ct. 313, 84 L.Ed. 355."

In Dr. William Howard Hay Foundation v. Safety Harbor Sanatorium, 145 F.2d 661, l.c. 663, the Court said:

> "The findings positively and definitely decide against plaintiff all fact issues tendered on the trial, and they fully support the conclusions of law. It is appellant's burden, therefore, to show us that these are clearly erroneous."

In Westchester County Park Commission v. United States, 143 F.2d 688, l.c. 694, 695, the Court said:

> "These rulings, to be sure, occurred in cases not involving condemnation; but that would seem to be a distinction without significance. Even, however, should we disregard those rulings, we would nevertheless conclude that there was no prejudice here. For, as under Rule 81 (a) (7), 28 U.S.C.A. following section 723c, the new rules of procedure are applicable to appeals in condemnation cases, we must, under Rule 43 (a), apply the more generous rule of evidence; therefore, the federal 'harmless error' statute (28 U.S.C.A. Sec. 391) governs; under that statute, the admission of the testimony was surely harmless. Cf. United States v. Miller, 317 U.S. 369, 375, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55.
>
> "(17) 5. Nothing is left to this appeal but, in effect, a request to us to conduct a trial de novo. This we cannot do. The trial court's determination of the facts must stand unless it is unsupported by substantial evidence. We see no warrant for reversal on that score."

VII.

Government's authority to dispose of present Post Office Building and Site is restricted by Acts of Congress.

It is apparent from the facts in the record now under consideration that the Government is not authorized by Section 341 or Section 345b of Title 40 U.S.C., or any other statute to exchange the present Post Office Building and site at Cape Girardeau for the land described in the Condemnation Petition already devoted to public use.

There is no claim by Petitioner that the government-owned building and site has been supplanted by a new structure, or that the Secretary of the Treasury has determined there is no further federal need for the present government-owned building and site.

Section 345b, Title 40, provides the only method for disposing of existing federal buildings and it applies only in cases where existing buildings have been supplanted by new structures.

The alleged agreement for such an exchange of property is unauthorized, illegal and void and cannot be effectuated under the guise of a condemnation suit.

Furthermore, it is evident that in the selection of the site in this case, the administrative agents gave no consideration "to the interest and convenience of the public," as required by Section 254, Title 40, U. S. Code.

VIII.

Petitioner misconceives the effect of the decision of the courts below.

Petitioner (Petition, P. 22, last paragraph) states that "the decision below would seem to require specific selection, by Act of Congress, of each site already put to a public use. Unless Congress is to be left in doubt as to what language, if any, is necessary or will serve to avoid this obviously impractical construction, review by this Court would seem to be essential." The Petitioner's criticism of the decisions of the courts below is wholly unwarranted, under the undisputed facts in this record. The facts are that the courts below followed the unbroken line of authorities authorizing the courts to review the action of administrative officials in the circumstances here presented.

In order to show that Petitioner has misinterpreted the decision of the courts below, we here quote from the opinion of the District Court (55 F. Supp. 555, 563) (R. 617) showing that the position of Petitioner is unfounded. The Court said:

> "Certain conclusions suggest themselves which should be stated. This is not a case, in fact, where the

representatives of the plaintiff have gone to the city of Cape Girardeau and designated the most imposing tract of ground in the city from a landscape viewpoint and which is now used as a public park, for the site of the new Federal building. And this notwithstanding the site is not in the trend of business nor accessible except from one street. That while the plaintiff will not take all the park, it will take a sufficient part of the park to destroy its usefulness as a park. That the plaintiff has proceeded to issue an order for the destruction of the public buildings on the site; buildings in which necessary public business is now transacted, including the Court of Common Pleas, Departments of City Government and the storage of valuable records, and granted to another building in which a public library is housed 'thirty days' to vacate. That this action was taken by the Joint Committee, with information in their possession with respect to availability of other sites which shows unquestionably that the action of the plaintiff is unnecessary and the site selected is not now, nor was it when selected, the most desirable and available. If this were the cold record, we believe few would question the conclusion that such action by the Joint Committee was arbitrary and unnecessary.

"Nevertheless the conclusions, as outlined above, are present as a matter of law on the record in this case. The evidence shows that plaintiff was caused to take action which leads to the same results as outlined above, by virtue of the solicitation and entreaty of the city officials of Cape Girardeau, which solicitation crystalized in an agreement between the city officials of the city of Cape Girardeau and the Government officials to trade the park site (described in the petition) for the present Federal building. The city officials of Cape Girardeau, no doubt acting in perfect good faith represented to plaintiff or the Joint Committee on site selection, that the city had a legal right to sell or exchange the park site. Also acting in perfect good faith the officials of plaintiff and the Joint Committee 'relied' upon the representations of the Cape Girardeau city officials as to their

legal right to sell or exchange the park site, and the Joint Committee so relying, 'based' their decision as to site selection, upon such erroneous representation. The City of Cape Girardeau being without a legal right to sell or exchange the park property, as held by the Supreme Court of Missouri and in the opinion in this case by the Federal Court of Appeals, leaves the action of the Joint Committee in selecting the park site in the same status, as a matter of law, as if no exchange negotiations had taken place, and the plaintiff's officials had never been induced to consider the site upon the basis of the proposed exchange.

"In the case of Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S. Ct. 364, 81 L. Ed. 510, the Supreme Court had before it the question of legality of a gas proration order issued by the Railway Commission of Texas, ostensibly for the purpose, among others, of preventing the waste of gas. We think what the Court said with respect to the presumption of the existence of facts justifying the specific exercise of the power there under consideration, applies to the selection of a site for a post office made by and under authority of those agents of the Government to whom such duty has been delegated. Referring to the order in the Thompson case, the Court said, 300 U. S. loc. cit. 69, 57 S. Ct. loc. cit. 371, 81 L. Ed. 510: 'It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise. * * * The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property.'

"A consideration of all the facts justifies the conclusion that defendant (Respondent herein) has sustained the burden of proof placed upon her; that the selection of the site described in the petition, under all the facts referred to, amounts in law to an arbitrary and unnecessary act. Plaintiff's second amended petition will be dismissed."

The above quoted language clearly shows that the contention of Petitioner (Petition p. 17) that arbitrary or capricious means "bad faith" has no application to the decisions of the courts below, under the undisputed facts in this record. The courts below expressly held that the question of bad faith did not enter into the consideration of the facts bearing upon the question of arbitrary or capricious action of the administrative agents.

Petitioner asks this court to grant a writ of certiorari on the grounds that the decision in this case is in conflict with the decision in the C. M. Patten and Company case, whereas an examination of the Patten case discloses that this case is not in conflict with the decision in the Patten case under the conceded facts in this record, but, on the contrary, is in exact accord and harmony with the Patten case.

C. M. Patten and Company v. United States, 9 Cir., 61 F. 2d 970 (erroneously stated as page 920 in the opinion of the Court of Appeals (R. 663)), quotes from United States v. City of Tiffin, 190 F. 279, 280, including the following:

> "This does not mean, however, that no power may intervene to prevent arbitrary action, for such power certainly abides in the courts."

The Court (61 F. 2d, l. c. 972) then says:

> "However, this right of the federal government to condemn is subject to the power of courts to intervene and prevent arbitrary and unnecessary action, which must be determined by the facts in each particular case."

The Court (page 972) also says:

> "Recognizing therefore the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved."

The Court (p. 972) then stated the advantages in the selection of the site and said:

"This conclusion was reached by the trial court and is sustained by the weight of the evidence."

The decision of the Circuit Court of Appeals was correct and is not subject to review when, in approving the findings of the District Court, based upon the evidence in this record, it said:

"We cannot say that any of these findings of fact by the District Court are clearly erroneous. On the contrary, each of them was, in our opinion, required by the evidence." (R. 661, 662.)

CONCLUSION.

The Respondent, by reason of the facts in the record and the applicable principles of law, believes that the Petition for Writ of Certiorari should be denied, and respectfully asks that the Court will so order.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX.

(The formal style of case omitted here.)

Washington, D. C.,
Tuesday, November 9, 1943.

Stipulation Between the Plaintiff, United States of America, and Defendant, Iska W. Carmack, Regarding an Agreed Statement of Facts to be Read in Evidence on the Part of the Defendant, Iska W. Carmack, in the Above-Entitled Cause.

Without limiting either the right of the defendant, Iska W. Carmack, to take depositions in the above entitled cause, or the scope of the inquiry in the above entitled cause, it is agreed between the plaintiff, United States of America, and Iska W. Carmack, one of the defendants in the above-entitled cause, as follows:

Item I. Agreed Statements of Facts.

That the United States of America, plaintiff, and Iska W. Carmack, one of the defendants in the above-entitled case, admit the statements of facts hereinafter set out, and agree that said statements of facts shall be read in evidence on behalf of the said defendant, Iska W. Carmack, on the trial of a certain cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482 (Condemnation Suit) wherein the said United States of America is plaintiff and the said Iska W. Carmack, is one of the defendants;

That said statements of facts hereinafter set out shall be received in evidence on the trial of said cause, as aforesaid, as agreed statements of facts;

That this stipulation, signed by the parties hereto, shall be filed with the shorthand reporter, spread upon the rec-

ord, and annexed to the certificate of the said shorthand reporter to be sworn to before a notary public in accordance with certain stipulations between the parties hereto, signed by said parties and filed with the said shorthand reporter, on the ninth day of November, A. D., 1943, and spread upon the record by agreement between said parties hereto, on said ninth day of November, A. D., 1943.

Item II. Description of the Property.

That it is agreed by and between the parties hereto that the property sought to be condemned in the above entitled cause by the United States of America, plaintiff herein, as the site for the construction and maintenance of a Post Office, Custom House, and Federal Court building at Cape Girardeau, Missouri, is located in the town (now City) of Cape Girardeau, Missouri, in the Eastern Judicial District of Missouri, Southeastern Division.

It is further agreed that the property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation, filed in the above-entitled cause, is now and has been for many years, devoted to public purposes (the Common Pleas Court House, City Offices, Public Library, and Public Park);

That Post Office Inspector M. J. Deutsch was designated as the Government's only Site Agent to visit said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri, for the purpose of investigating and recommending to the Joint Committee considering the selection of the Post Office, Custom House, and Federal Court Building Site at Cape Girardeau, Missouri, an available, suitable, and fitted site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

That said Post Office Inspector, M. J. Deutsch, in fact visited the said City of Cape Girardeau, Missouri, from July 23 to 26, 1940, and from July 29 to 31, 1940, during which time the said Post Office Inspector, M. J. Deutsch, investigated each of the twenty-two (22) parcels submitted in response to the advertisement of the United States of America to submit proposals of sites for inspection.

That the said Post Office Inspector, M. J. Deutsch, did, after considering facts pertinent to the site selection for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, make a report to said Joint Committee considering the selection of said site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, wherein said Post Office Inspector, M. J. Deutsch, recommended as his first choice a site other than the public property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause.

That copies of said Site Agent's report, made by said Post Office Inspector M. J. Deutsch, were sent with the letter sent to The Honorable, The Attorney-General of the United States requesting the filing of the Plaintiff's (Second) Amended Petition in Condemnation in the above-entitled cause;

That a copy of said report and recommendation of said Post Office Inspector M. J. Deutsch was sent to Harry C. Blanton, United States Attorney of Eastern Judicial District of Missouri, the attorney of record for the United States of America, the plaintiff in the above-entitled cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action. File No. 482, and said copy of said report of said Site Agent, Post Office Inspector M. J. Deutsch, is now in the custody of said Harry C. Blanton, United States Attorney.

It is further agreed that the property sought to be condemned by the plaintiff, the United States of America, in the above-entitled cause is in the nature of a public park upon which is located a Court House used by the Court of Common Pleas of Cape Girardeau County, a Public Library Building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the library building.

The park upon which these structures are located is used for gatherings of the Boy Scouts, and gatherings of various other groups. It is also used as place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but is used for public speakings. The second story of the court house is occupied by the Common Pleas Court, a Judge's Chambers, and a law library for the court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the clerk of the Court of Common Pleas, the city engineer, the mayor, the city council, and the city attorney. There is a basement in this building used largely for a storage space, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn all the property with the improvements thereon except the library building.

[Stipulation contains no Item III.]

Item IV. Public Library and Public Library Building.

It is agreed by and between the parties hereto that there is now and has been for many years past continuously maintained a public library building in which the said City of Cape Girardeau, Missouri, now and for many years past has continuously maintained a public library for the general public, both as a public library and also additionally as a meeting place for civic organizations such as garden clubs, rose societies, historic societies, and other civic and public gatherings.

All of the real estate on which the above-mentioned public library building is located, together with all of the real estate adjacent to said public library building, is included in the description of the property sought to be condemned in the (Second) Amended Petition, in Condemnation, filed by the United States of America, plaintiff, in the above-entitled cause in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482, wherein the said Iska W. Carmack is one of the defendants;

That the City of Cape Girardeau, Missouri, will be required to vacate said public library building situated on the said real estate sought to be acquired by the United States of America by condemnation in the above-entitled action upon thirty days' notice by the Government, and, upon notice, to remove said Library and Library Building from Government property within a reasonable time.

The land sought to be condemned was originally conveyed with other land in 1807 by its then owner, Louis Lorimier, to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the thirteenth day of January, 1806, to have the Seat of Justice of that District permanently fixed upon his land at that place. The deed contains provisions in the nature of conditions or limitations that the land so given should 'be and remain forever common and public, and never to be appropriated to private use, agreeably to the explicit intention of the donor.'

Item V. Facts Regarding the Deeds of 1814 and 1820.

It is agreed by and between the parties hereto that in 1814, the Seat of Justice in the meantime (between 1804 and 1814) been removed from Cape Girardeau to Jackson, the Judges of the Court of Common Pleas in form conveyed this tract to the heirs of Louis Lorimier, and on September 11, 1820, all of the heirs of Louis Lorimier, deceased, conveyed the premises by quit claim deed to the inhabitants of the Town of Cape Girardeau collectively 'for their use, benefit and behoof forever.'

This deed conveyed certain other property not here involved, and concluded with the following paragraph:

> "Provided always that the several tracts or parcels of land thus granted to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property."

That the said defendant, Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in paragraph *Eleventh*, of Plaintiff's said (Second) Amended Petition in Condemnation.

That said defendant, Iska W. Carmack, is an inhabitant, citizen, taxpayer, and owner of lots in and near the said town (now city) of Cape Girardeau, Missouri.

It is further agreed by and between the parties hereto that the acquisition by the Government by condemnation in the Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause will include all property under and immediately adjacent to the Public Library Building.

Item VI. Agreement to Exchange Property.

That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the Old United States Post Office Building located in said City of Cape Girardeau, Missouri;

That said City Officials claimed and represented that they based their authority to sell or dispose property upon Section 7210 and 7211 of the Revised Statutes of Missouri 1929;

That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the old Post Office Building and site for the property ought to be condemned is based upon said representations as to the right and authority of the City Officials to sell or dispose property under said Section 7210 and 7211 of the Revised Statutes of Missouri 1929.

Item VII. Harlan Bartholomew.

Several years ago Harlan Bartholomew of St. Louis, Missouri, a city planning expert, made a plan for the City of Cape Girardeau, Missouri.

Item VIII. Architect.

It is agreed by and between the parties hereto that Associate Architect H. A. Tucker had no authority and was given no instructions to examine any sites offered at the City of Cape Girardeau, Missouri, other than the site sought to be condemned, for the Post Office, Custom House, and Federal Court Building, but, acting under instructions dated September 25, 1940, of the said Joint Committee, visited Cape Girardeau between October 1 and October 7, 1940, for the purpose of obtaining such data as necessary to develop studies for utilizing the property sought to be condemned in the Plaintiff's (Second) Amended Petition in Condemnation; and further,

That the said H. A. Tucker had no authority, and was given no instructions to make any investigation of said other sites, and had no authority to make any recommendations to the said Joint Committee regarding the selection of a site for the New Post Office Building, Custom House, and Federal Court Building, at Cape Girardeau, Missouri, and, in fact made none.

Item IX. Liaison Officer.

It is agreed by and between the parties hereto that H. S. Roome, Liaison Officer of the Federal Works Agency, had no authority, and was given no instructions to inspect any sites offered at the City of Cape Girardeau, Missouri, for the Post Office, Custom House, and Federal Court Building, and made none, but, acting under instructions of the Federal Works Administrator, dated November 20, 1940, the said Liaison Officer H. S. Roome conferred with City Officials at Cape Girardeau, Missouri, from November 24 to November 29, 1940, inclusive, for the purpose of negotiating a mutually satisfactory proposal to be submitted to the Government by the City Officials of Cape Girardeau, Missouri, for the exchange of the property described in Plaintiff's (Second) Amended Petition in Condemnation

filed in the above-entitled cause, for the old Post Office Building and site.

The said Liaison Officer H. S. Roome agreed with the City Officials of Cape Girardeau, Missouri, on the form of proposal to be submitted to the Government for the exchange of property, but made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

Item X. Petitions of Cape Girardeau, Missouri, Citizens and Taxpayers Filed With the Joint Committee.

That it is agreed by and between the parties hereto that John Sample of Cape Girardeau, Missouri, did, on or about November 19, 1940, cause to be filed a petition with the Joint Committee considering the selection of a site for the Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, signed by six hundred and sixty-seven (667) citizens and property owners of said City of Cape Girardeau, Missouri, protesting any action which would result in part of the said park (property sought to be condemned) being used for Federal building purposes.

Item XI. Project Deferred for the Duration.

That it is agreed by and between the parties hereto that the project of constructing a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, has been deferred for the duration of the War, and the City Officials of the said City of Cape Girardeau, Missouri, were notified of said deferment of said project for the duration on February 19, 1942, by the Administrator of Public Works.

Item XII. Recommendation of the Joint Committee.

That said Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, recommend the acceptance of the City's proposal which had been worked out as to form by the said H. S. Roome, Liaison Officer.

The recommended acceptance of the site sought to be condemned by the Joint Committee was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted to occupy the present Federal Building and site at Cape Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time.

Item XIII. Agreement Does Not Limit Right of Iska W. Carmack to Offer Additional Further Evidence.

It is further agreed by and between the parties hereto that the foregoing statements of facts are to be offered in evidence on the part of the Defendant, Iska W. Carmack, on the trial of the above-entitled cause without prejudice to the right of said Iska W. Carmack to offer further and additional and other testimony regarding any or all of the facts herein set out.

The Parties Hereto Stipulate And Agree as set out in the above and foregoing statements of facts, and in witness thereof hereunto set their hands and affix their seals this 9th day of November, A. D., 1943, Washington City, District of Columbia, U. S. A.

UNITED STATES OF AMERICA,
Plaintiff,
By B. J. Hasson, Attorney,
Department of Justice.

ISKA W. CARMACK, Defendant.
By L. Lee Bowman,
Cape Girardeau, Missouri,
and I. R. Kelso, Attorney.

I. R. KELSO,
Offices in the First National
Bank, Cape Girardeau, Missouri.

The foregoing statements approved by:

HARRY J. McNERNEY,
Attorney, Federal Works Agency.

The law to be applied to the facts in this case, is the law of the State of Missouri as declared by the Supreme Court of Missouri with respect to the power of the City to exchange or convey the property here involved. The opinion of the Supreme Court of the State of Missouri construing the deed from the Lorimer heirs of September 11, 1820, relied upon by the United States in this case, is, therefore, for convenience and ease of reference, here printed in full, as follows:

The Board of Regents for Normal School District No. 3 v. Painter, Appellant, 102 Mo. 464; 14 S. W. 938.

The plaintiff as a body corporate brought this action of ejectment to recover out lot H in the city of Cape Girardeau. The lot in question is the eighth and last parcel of land described in the following deed, dated the eleventh of September, 1820: "Be it remembered that the undersigned heirs and legal representatives of Louis Lorimier, deceased, namely, Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier and Thomas S. Rodney as guardian of Thomas Jefferson Rodney and Polly Rodney, for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged and for divers other good considerations and more particularly for the convenience and encouragement of the inhabitants of the town of Cape Girardeau and owners of lots in or near the same, have given, granted, sold, aliened, quitclaimed and conveyed, and they do hereby give, grant, sell, alien, quitclaim, convey and confirm unto the inhabitants of the town aforesaid collectively, for their use, benefit and behoof forever, the several lots or parcels of land hereinafter described, viz.: First. The place known and designated in the plan of said town as the Public

Square, bounded * * * as originally laid off and containing four acres. Second. Lot number 22, in range C, bounded * * * including a spring. Third. Lot number 22, in range A, bounded * * *. Fourth. All the vacant space between the river Mississippi and the front of ranges A, B, G and H, designated on the map by the name of Front Street or Aquamsi; and generally all the ground appropriated to streets and alleys throughout the whole town, as represented in the plan thereof. Fifth. The space on the river above the town, in front of out lot number 1, containing two acres and half more or less. Sixth. A hundred feet square in out lot number 2 and adjoining North street, so as to afford a convenient access to the spring used in that part and to include said spring. Seventh. Six acres of land (as laid off in the map of out lots) situated part in out lot number 2 and part in out lot number 32 and now used as a graveyard; with the condition that the western half thereof shall be and remain appropriated to the Roman Catholic Church. Eighth. An out lot marked h containing about three acres and a quarter, bounded eastwardly by Pacific street and westwardly by John Scripp's purchase of six acres, on the north by out lot g and on the south by out lot i, which lot, including a large spring, is destined for the establishment of a public school. Together with all and singular the right, title, * * *; provided always that the several tracts or parcels of land granted to the town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public use to which they are respectfully intended, and that they, or any part of them, shall never become private property. In testimony whereof, etc."

The plaintiff put in evidence the foregoing deed, and an ordinance of the city of Cape Girardeau, approved the twenty-fourth of September, 1873, which provided: "That the Mayor of the city of Cape Girardeau be and he is hereby authorized to offer to donate to the regents of the Southeast Missouri Normal School said described lot as an additional inducement to locate said school in said city, and he is authorized to make a deed to said regents of said normal school under the seal of said city, turning over, confirming and quitclaiming all right of the city to said lot to said regents of said school for said purpose, always provided said

Southeast Missouri Normal School shall be located in the city of Cape Girardeau and which said lot may be sold and disposed of as the said regents may see proper, to further the erection of the buildings necesary for said school within said city."

Also a deed dated November 13, 1873, executed pursuant to said ordinance, and purporting to convey lot H to the regents of the Southeast Missouri Normal School.

The plaintiff produced further evidence to the effect that the school was located in the City of Cape Girardeau in 1872 or 1873. The same evidence shows that the building was not located on the lot in question, but in another and different part of the city. Mr. Painter, the defendant, testified on the part of the plaintiff that he had been in possession of the lot for about ten years, that he made no claim of title to the premises and that they were of the rental value of three dollars per acre per annum. This was all the evidence produced, and on it the court gave judgment for the plaintiff.

The defendant objected to the deed from the city of Cape Girardeau to plaintiff, assigning as a reason therefor, that, *under the terms of the deed from the Lorimier heirs to the inhabitants of the town, the present city of Cape Girardeau had no power to convey the premises to the plaintiff and that the deed was therefore void.* This objection was overruled, both when the deed was offered in evidence and again by instructions given and refused. *If the objection is well taken it disposes of this appeal.*

The deed from the Lorimier heirs was made, it will be seen, in 1820. It may be that the town of Cape Girardeau had then been incorporated under territorial laws, but there is no evidence upon that subject in the record. We are not even informed by the record or briefs when or by what law the present city of Cape Girardeau was incorporated. We shall, however, assume that it is an incorporated city with the usual governmental powers and that it has power to hold real property and to sell the same when not dedicated to some particular use. Again the defendant in his brief says he is defending this case in the interest of the local public schools, but we find nothing

to that effect in the pleadings or in the evidence. In short the case is before us on a very unsatisfactory record.

The owner of lands may devote and dedicate them to public use; and it is now well settled law that a dedication of lands to public use does not require the existence of a corporation in which to vest the title. Such a dedication will be valid without any specific grantee in existence at the time the dedication is made. The public is an ever-existing grantee, capable of taking a dedication for public uses. Rutherford v. Taylor, 38 Mo. 317; Trustees v. Council of Hoboken, 33 N. J. L. 16. The deed of the Lorimier heirs may, therefore, have full force and effect as a dedication of the various parcels of land therein described to public use, though the inhabitants of the town were not at the date thereof incorporated.

The Lorimier heirs by their deed conveyed the various parcels of land *"to the inhabitants of the town aforesaid, collectively, for their use, benefit and behoof forever;"* and of the particular lot now in question the deed says, "which lot including a large spring is destined for the establishment of a public school." There is the further clause to the effect that the several parcels of land *"shall remain forever affected and appropriated to the public uses" to which they are devoted, and shall "never become private property."*

It is clear from these clauses of the deed that the donors intended that this lot should be forever used by the inhabitants of the town for the establishment of a public school; that the lot itself should stand affected with and appropriated to that use, and that it should never become private property. *Conceding that the present city of Cape Girardeau has invested in it as a corporation the right and power to manage and control this property, still it does not follow that it has the power to alien or convey the same.* With the concession just made the *city is but a trustee to manage the property for the uses and purposes to which it was devoted by the donors.* It may control and regulate the use of the property, but it has no right to devote the same to private uses, *or even to public uses different from those specified in the deed.* Cummings v. The City of St. Louis,

90 Mo. 259. Where land has been dedicated to specific limited and defined purposes, the subject of the grant cannot be used for another and a different purpose. Price v. Thompson, 48 Mo. 361, citing with approval Warren v. The Mayor of Lyons City, 22 Iowa, 351.

But the plaintiff insists that the city by conveying this property to the plaintiff is carrying out the very purposes for which the lot was set apart by the Lorimier deed, and that the normal school is a public school within the meaning of that deed.

This normal school was established under the act of March 22, 1873 (Acts of 1873, p. 79), and is conducted under the provisions of article 3 of chapter 150, Revised Statutes, 1879. It is one of the three normal schools established in this state, the state being divided into three districts for such purposes. Section 7167 provides that the Board of Regents shall require applicants for admission "to sign and file with the secretary of the board a declaration of intention to follow the business of teaching in the public schools of the state. These schools, it will be seen, were established for the primary purpose of training and educating school teachers. While they are supported, in the main, from the public treasury and are part of the school system of this state, still we think it is clear they are not public schools within the meaning of the Lorimier deed. The grantors therein say they made it "more particularly for the convenience and encouragement of the inhabitants of the town of Cape Girardeau and of the owners of lots in and near the same."

The donors did not set this lot apart for the benefit of a few persons who might elect to follow a particular calling, but they intend it to be appropriated to a school which would be open to all, regardless of any declared intention to follow a particular avocation. That a school established in conformity with the Lorimier deed may be under the control of the laws concerning public schools we have no doubt; but we are also of the opinion that the donors used the words "public school" in a general and popular sense, and by it they meant a school which would be open to all of the inhabitants of the town. This being so the city had no right or power to convey the lot to the plaintiff. *It*

could no more convey the lot to plaintiff than it could the other parcel called a public square. As said in Trustees v. Council of Hoboken, supra, when speaking of the powers of local authorities: "They cannot sell the lands so dedicated, nor release nor extinguish the use for which they were dedicated, nor employ them in any way variant from the purposes for which they were designed."

Our conclusion is that the deed from the city to the plaintiff was an effort on the part of the city to devote this property to purposes other and different from that contemplated by the donors, and that the deed is worthless and conveyed nothing. The city has no power to donate this property to plaintiff. The judgment is, therefore, simply reversed. All concur.

Note: Italics are used by respondent for convenience in pointing out matters involved in the case now under consideration, and the property called "a public square" in the foregoing opinion is the identical property sought to be condemned. (R. 611.)

FILE COPY

FILED
OCT 9 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, *Petitioner*,
vs.
ISKA W. CARMACK, *Respondent*,
} No. 40

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT ISKA W. CARMACK

HOMER HALL,
509 Olive Street, St. Louis 1, Mo.,
ROBT. D. ABBOTT,
506 Olive Street, St. Louis 1, Mo.,
I. R. KELSO,
First National Bank Bldg., Cape Girardeau, Mo.,
L. LEE BOWMAN,
H. & H. Bldg., Cape Girardeau, Mo.,
Counsel for Respondent.

GIBSON PRESS, 108 South Ninth Street, St. Louis 2, Mo.—CHestnut 5956

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ARGUMENT 18

I. The matters at issue in the within cause were correctly decided by the Circuit Court of Appeals when it affirmed the judgment of the District Court in favor of Respondent and against the Petitioner, on the ground that the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 1427, Title 40 U.S.C. 341, under the record in this case, did not confer upon the Public Works Administrator and the Postmaster General the power asserted in this case by Petitioner to condemn the particular land in question 18

II. Petitioner abandons the theory upon which it tried this case in the courts below in its Petition for Writ of Certiorari filed herein, and we respectfully submit it is without merit and should be denied 22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, *Petitioner*,
vs.
ISKA W. CARMACK, *Respondent*,
No. 40

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT ISKA W. CARMACK

PRELIMINARY STATEMENT.

Counsel for respondent are not satisfied with the statement of facts presented by the petitioner and are, therefore, submitting what we consider a more accurate and complete statement of facts contained in the voluminous record in this case.

STATEMENT OF THE CASE.

A Stipulation of an Agreed Statement of Facts was offered in evidence in its entirety on the trial of this cause and is hereinafter frequently referred to both in the Statement of the Case and the Argument. That Stipulation (R. 157-166) is printed in the Appendix, pages 1a-11a. Petitioner has ignored the Stipulation of Agreed Facts above mentioned in its Petition for Writ of Certiorari.

The undisputed facts disclosed by the record, which respondent believes fully support and establish the correctness of the opinion and decision of the Circuit Court of Appeals, may be grouped under the following headings:

1. **Present Public Uses of Proposed Site.**
2. **Destruction of Existing Public Uses Would Be Inevitable.**
3. **Exchange of Property Is the Basis of This Suit and Required Dismissal of Condemnation Petition.**
4. **The Record Shows That the Site Which Government Officers Selected Would Not Provide Suitable Accommodations for Court House, Post Office and Custom House as Required by Act of Congress of May 25, 1926, Cited and Relied Upon by Petitioner.**
5. **Government's Only Site Agent Recommended Selection of a Different Site.**

1. Present Public Uses of Proposed Site.

Item II of the Stipulation of Agreed Statement of Facts (R. 158, 160) (App. pp. 2a-4a) fully describes the present public uses of the property sought to be condemned.

The Stipulation is approved by **Harry J. McNerney**, Attorney for the Federal Works Agency. **Mr. McNerney** was called as a witness in this case by the Government. He stated he is Special Assistant General Counsel for the Federal Works Agency and assisted in preparing that Stipulation (R. 157-166) (App. p. 11a).

Referring to the contents of that Stipulation, which sets forth the basis upon which the selection of the site was made in this case, **Mr. McNerney** testified:

> "The Court: Were there material matters before the department on which they based a decision that are not in that agreed statement of facts or stipulation?
>
> A. Not to my knowledge.
>
> The Court: Is it your knowledge from an examination of the files in the department with which you are connected that this stipulation that you entered into covers material facts upon which the department based its decision?
>
> A. That is right" (R. 541-542).

The present public uses of the proposed site are fully and adequately stated in the opinion of the Circuit Court of Appeals, as follows:

> "The land sought to be taken by the United States was conveyed to the inhabitants of the Town of Cape Girardeau, predecessor of the City of Cape Girardeau, in 1820 to be held forever by the grantees as a public park for the use and benefit of the inhabitants of the town and the owners of adjacent lots. The City of Cape Girardeau has no power to convey any part of the public park nor to devote it to any use other than that specified in the deed under which it has been held by the City and its predecessor for more than a century. **Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W.**

938, 940; Carmack v. United States, 135 F. (2d) 196. That part of the park now sought to be condemned is occupied by the public library building of Cape Girardeau and by the local courthouse. The entire second floor of the courthouse is used by the court of common pleas, a court of record with jurisdiction in civil and criminal matters. The first floor is occupied by the offices of the City of Cape Girardeau, including the mayor, city engineer, city clerk, city council, and city attorney, and also by the clerk of the court of common pleas. The basement of the building is used largely for storage space for the files and records of the common pleas court. The library building is used as a meeting place for all local civic organizations. The property described in the Government's petition for condemnation is a tract measuring 280x240 feet near the center of the park" (R. 660, 661).

The record shows that the evidence on the second trial as to the present public use of the particular land described in Petitioner's Second Amended Petition in condemnation, as above quoted, is the same as the evidence on the first trial [135 F. (2d) 196, l. c. 198] and is the identical property described in Item II of the said Stipulation of Agreed Facts (R. 159, 160) (App. pp. 2a-4a).

At page 200 of the first opinion in this case [135 F. (2d) 196-200], the Court said:

> "The record shows without dispute that the property has been devoted to public use, not only because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose."

2. Destruction of Existing Public Uses Would Be Inevitable.

In affirming the judgment of the District Court on the second trial, the Court below correctly stated the facts shown by the Record, as follows:

"The District Court found on substantial evidence that taking by the Government of that part of the park sought to be condemned would result in the destruction of the use of the remainder of the tract as a park; would require the wrecking of the common pleas court building and the removal of the public library building and a public monument; and would materially interfere with the proceedings of the court of common pleas and with the transaction of city business in the courthouse building, and also with the plans for a civic center prepared by an expert employed by the local chamber of commerce for that purpose. The Court also found that there was no necessity for the taking of the land described in the petition for condemnation; that other sites in the City of Cape Girardeau were available for the proposed Federal Project; that the failure to secure the land in this proceeding would not result in the failure of the Federal Project; and that the park was not selected by the Federal Works Administrator and the Postmaster General as a site for the Federal building upon the considerations of Federal necessity or advantage, but because of the erroneous belief of these Federal Agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated.

We cannot say that any of these findings of fact by the District Court are clearly erroneous. On the contrary, each of them was, in our opinion, required by the evidence. By this evidence it was shown that the United States owned a postoffice, courthouse, and customhouse building in the City of Cape Girardeau,

located on the most prominent corner of the city, opposite the leading hotels, convenient to the largest patrons of the postoffice, and nearer the center of free mail delivery in the City than any other available location. It further appears that adjoining the site on which the present Federal building stands are tracts of land which the United States may acquire by purchase or condemnation at reasonable cost, and which, together with the site presently owned by the United States, affords sufficient area for any necessary additions to the present building as well as for the construction of a new building. The site now owned by the United States, together with the adjoining available tracts, was selected by the only representative of the Postoffice Department and the Federal Works Agency who made a study of the relative merits of available sites in Cape Girardeau as the most desirable from the standpoint of the United States" (R. 661, 662) [151 F. (2d) 881, 882].

In this connection it should be noted that the Public Library site was not understood by the Committee to be included in the negotiations for exchange of property. **Mr. Meyers, Fourth Assistant Postmaster General,** in referring to this matter, testified in part as follows:

"Q. Do you know whether the original plan for the condemnation of a part of the park and courthouse contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site" (R. 137).

Louis Hecht, a prominent merchant on Main Street at Cape Girardeau, and the owner of some ten store buildings on Main Street, in referring to the condemnation of the Library site and building, testified, in part, as follows:

"Q. When did you first learn from any source that

the Public Library Building was included in this condemnation? * * *

A. When I first learned that the library is included in the condemnation proceedings?

Q. Yes, sir.

A. I never knew that the library was included. I have always been under the impression that if the postoffice is located where the courthouse is now that it would not affect the library, that the library would not be affected in any way, it would be left as it is" (R. 249).

The Stipulation of Agreed Facts—Item IV—referring to Public Library and Public Library Building, a part of property sought to be condemned, contains the following statement:

"It is agreed by and between the parties hereto that there is now and has been for many years past continuously maintained a public library building in which the said City of Cape Girardeau, Missouri, now and for many years past has continuously maintained a public library for the general public, both as a public library and also additionally as a meeting place for civic organiaztions such as garden clubs, rose societies, historic societies, and other civic and public gatherings" (R. 157, 160) (App. p. 5a).

Undoubtedly referring to a referendum petition signed by over 2,000 citizens of Cape Girardeau protesting against an exchange of property (R. 444), in addition to the protests set out in the Report and Recommendations of **M. J. Deutsch**, the Government's only Site Agent (R. 167-204), said Report states:

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. The president of the Chamber of Commerce decided not to give an opinion as to his preference.

The postmaster, who has no financial or personal interest in any of the locations, but who is conscientiously interested in civic development, regards the government-owned site as an outstanding location but recommends the city park as first choice because this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings. As a second choice, in the event that a trade with the city is not feasible, the postmaster prefers the present government-owned site" (R. 188, 189).

The **Deutsch Report and Recommendations** closes with this recommendation:

"For First Choice I recommend that the present Government-owned site be retained and that the adjoining property, Site 2 offered by **H. Bremermann**, be purchased for $15,000, and that a counter offer be made to the owner of Site 3, **Ella M. Drum**, to purchase this site for $600.

This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction" (R. 189).

3. Exchange of Property Is the Basis of This Suit and Required Dismissal of the Condemnation Petition.

Walter F. Meyers, Fourth Assistant Postmaster General, testified on behalf of the Government, in part, on examination by the Court, as follows:

"The Court: Did you reach your conclusion on the theory the City would convey title to this land?

A. Yes, sir; I read the cases that had been presented, and I was of the opinion that the opposing view was not correct. I had practiced law for thirty years myself and thought that might mean a little something" (R. 131).

The Stipulation of Agreed Facts expressly recites that the authority of the city officials to enter into the agreement for an exchange of properties is based upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362, Revised Statutes of Missouri, 1939).

Item VI of the Stipulation of Agreed Facts reads, as follows:

> **"Item VI—Agreement to Exchange Property.**
> That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the old United States Post Office Building located in said City of Cape Girardeau, Missouri;
>
> That said City Officials claimed and represented that they based their authority to sell or dispose property upon Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362 of the Revised Statutes of Missouri, 1939).
>
> That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned is based upon said representations as to the right and authority of the City Officials to sell or dispose property under said Sections 7210 and 7211 of the Revised Statutes of Missouri, 1929 (now Sections 7361 and 7362 of the Revised Statutes of Missouri, 1939)" (R. 162, 163) (App. p. 7a).

The sections of the Missouri Statutes relied upon, as hereinabove referred to, read as follows:

> "Sec. 7361. **May Sell and Convey Commons.**—Where any city, town or village in this state hath a common annexed to it, the trustees or body corporate of said city, town or village shall have authority to sell or convey, by deed in fee simple, all the common annexed to said city, town or village (R. S. 1929, Sec. 7210).
>
> Sec. 7362. **May Pass Ordinance and Perform Other Acts Necessary to Effect Sale.**—The trustees, or body corporate, of said city, town or village, is hereby given full power and authority to pass any laws, by-laws, ordinance or other necessary provisions regulating and effecting the sale of said commons, or to perform, or cause to be performed, all acts that are, or may become, necessary to carry into full effect the sale of said commons by said city, town or village" (R. S. 1929, Sec. 7211).

Other evidence in the Record showing that the purpose of the condemnation proceedings was to effect an exchange of properties is set out and discussed in the argument.

4. The Record Shows That the Site Which Government Officers Selected Would Not Provide Suitable Accomodations for Court House, Post Office and Custom House as Required by Act of May 25, 1926, Cited and Relied Upon by Petitioner.

The Statute of May 25, 1926, which petitioner cites and relies upon as the Statute involved (U. S. Br. pp. 3, 12, 23, 37) was enacted, "To enable the Federal Works Administrator to provide suitable accommodations * * * for court houses, post offices, immigration stations, custom houses * * *," and the record in this case shows that the

land sought to be condemned would not "provide suitable accommodations" for the Federal court house, post office and custom house at Cape Girardeau, and the decision of the Circuit Court of Appeals was not only authorized but was required by the Statute and the undisputed facts in the Record.

The Government architect, **Hart**, on cross examination by counsel for petitioner, showed the lack of availability of the land in question when he testified:

> "Q. You made the statement a little while ago that all that would be left on the east side of the building would be terraces. Aren't all those terraces included in the Government acquisition down to Spanish Street?
>
> A. No, sir, the new property comes up to the terraces. The terraces are out beyond. The property lines come about to here. The terraces are down beyond that (indicating)" (R. 369).

It is conceded in this Record that the description of the land in question referred to by the witness **Hart**, is accurately described with respect to its elevation and boundaries as set out in the opinion by the District Judge (55 F. Supp. 555, 556), as follows:

> "The Park is bounded on the east by Spanish Street, which is 40 feet below the level of the proposed site. To go from Spanish Street to the proposed site it is necessary to ascend approximately 60 steps. The east line of the proposed building site is near the top step, leaving approximately 100 feet between the east line of the proposed site and the east line of the Park site. These strips of land thus remaining on the north, east and west outside of the boundary lines of the proposed site are not sought by plaintiff and are to remain Park property." (See United States Exhibit 11, R. 498, 499.)

The Report and Recommendations of **Deutsch** (the Government's only Site Agent) show the "disadvantages" of the particular land in question in the following language:

> "This location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of future business expansion or growth. A new building here would face a side street with only residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it may be necessary to forego advantages, with respect to necessary approaches and driveways" (R. 177).

[redacted] particular land described in the petition with other sites, the Report and Recommendations of the Government's only Site Agent concludes:

> "It is my opinion that the present Government-owned site and adjoining ground is the most outstanding location in the city. Any of the other sites would be merely a compromise to avoid the demolition of the present federal building. While due regard must be given to public sentiment, it is obvious that the city park site, while it might provide an attractive setting, would present a problem to develop for practical utilization. The third choice would make a fairly suitable site, especially in the event that the present federal building would remain, but the lack of a bid from **Miss Greene** and the sentiment in her favor against condemnation is a serious obstacle" R. 185).

As to the site recommended by the Government's only Site Agent as "first choice," in preference to the particular land sought to be condemned, the Deutsch Report and Recommendation states:

> "This (present Post Office site) is an excellent

corner location facing the most prominent intersection in the city and on the principal business street. The center of the business section is not definitely ascertainable because of the diversion caused by the three business sections, but this corner is generally regarded as being the center of the business district. This location is about two blocks north and three blocks east of what might be designated as the center of delivery and the approximate center of population. It is directly across the street from the bus depot, the largest office building in the town, and the two principal hotels which are convenient for sessions of the Federal Court.

The location is also conveniently situated with regard to the Southeast Missourian Publishing Company and the Missouri Utilities Company, two of the largest mailers in the city. Regardless of the fact that the trend of the business district is toward the west on Broadway, this would remain the principal and the most prominent intersection because of the character of the buildings now standing. The purchase price of the Bremermann property is reasonable, and the strip owned by Drum can no doubt be purchased for approximately $600" (R. 177-178).

The Record shows that the only investigation or consideration of the suitability of the land in question as an available, suitable and fitted site was the investigation and recommendation made by **M. J. Deutsch**, the Government's only Site Agent. Bearing on the selection and character of the land in question, we here call attention to the following undisputed evidence in this Record.

Walter Meyers, Fourth Assistant Postmaster General, testified, on cross examination, as follows:

"Q. Now was there any information assembled with respect to the selection of a site for the post office at Cape Girardeau after the suit had been reversed by the Circuit Court of Appeals in this proceeding?

A. Not that I know of" * * * (R. 136).

Mr. Meyers further testified:

"Q. And your files, to your knowledge, have no papers of any kind showing any action taken by **Postmaster-General Walker** in his capacity as Postmaster-General prior to the signing of this paper (Government Exhibit 4) on June 10, 1943? (R. 86.)

A. I think that is correct.

Q. And that is also true of **General Fleming?**

A. I don't know, but I assume so.

Q. Do you know whether there was any information furnished to the Postmaster-General or the Administrator of Public Works Agency, in the form of a plat showing the property sought to be condemned in this proceeding, before the architect, **H. A. Tucker,** visited Cape Girardeau?

A. I don't know.

Q. Do you know whether the original plan for the condemnation of a part of the Park and court house contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site" * * * (R. 137).

As hereinabove set out under Subdivision 3 of this statement, **Mr. Meyers** testified that his Committee reached its conclusion regarding the exchange of property on the theory the City would convey title to this land. The Government not only fails to consider but wholly ignores the Stipulation of Agreed Facts, Report and Recommendations of the Government's only Site Agent, and all other facts in this Record, which conclusively show that the site selected is not available, suitable and fitted for the Post Office site.

The Record clearly shows that **Fourth Assistant Postmaster-General Meyers** was mistaken in testifying that **Mr. M. J. Deutsch** was not the only Government Inspector

to make an examination of the sites at Cape Girardeau and recommendations to the Joint Committee.

On cross examination **Mr. Meyers** testified:

> "Q. Now the Government's only site investigator in this case was **Post Office Inspector M. J. Deutsch?**
> A. No, that is not correct. **Mr. Betterly** came out to go over this matter, **Mr. Witman** came out, and two architects came out to go over it" (R. 128).

Mr. J. F. Betterley, referred to by the Fourth Assistant Postmaster-General as one of the persons investigating the site, testified that he never at any time acted in the capacity of a Site Agent. Note the following question and answer by **Mr. Betterley** in this connection:

> "Q. And you made no record for the Committee?
> A. That is right" (R. 354).

The testimony of **E. R. Witman,** referred to in **Mr. Meyers'** testimony, showed that he was Fiscal Manage. and had nothing to do with the inspection of Post Office sites.

The Stipulation of Agreed Statement of Facts shows that **H. S. Roome** prepared the form of proposal for the exchange of properties, but made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for the Post Office (R. 163, 164). Item IX, Stipulation of Agreed Facts (App. pp. 8a, 9a).

The Stipulation of Agreed Facts further shows that **H. A. Tucker,** referred to by the Fourth Assistant Postmaster-General as making an investigation of the sites at Cape Girardeau, had no authority and was given no in-

structions to make investigation of sites at Cape Girardeau, and had no authority to make any recommendations to the Joint Committee regarding the selection of a site at Cape Girardeau, and in fact made none (R. 163). Item VIII, Stipulation of Agreed Facts (App. p. 8a).

The lack of information on the part of the agents of the Government regarding the physical facts at the Court House site is disclosed on the cross examination of **R. S. Hart** (one of the architects referred to by the Fourth Assistant Postmaster-General), as follows:

> "By **Mr. Hasson**, Attorney for the Department of Justice:
>
> Q. **Mr. Hart**, you stated your duties were to go down there and locate the building on the site that was to be secured for this particular site. Did you have anything to do with recommending the site for selection by the Postmaster-General and the Federal Works Administrator?
>
> A. No, sir."

5. Government's Only Site Agent Recommended Selection of a Different Site.

The Stipulation of Agreed Facts in this Record shows:

That Post Office Inspector, **M. J. Deutsch**, was designated as the Government's only Site Agent to visit the City of Cape Girardeau, for the purpose of investigating and recommending to the Joint Committee considering the selection of the Post Office, Custom House and Federal Court Building site at Cape Girardeau, an available, suitable and fitted site for the construction and maintenance of such building at Cape Girardeau.

That the said Post Office Inspector, **M. J. Deutsch**, did, after considering the facts pertinent to the site selection for the construction and maintenance of a Post Office, Custom House and Federal Court Building at Cape Girardeau, make a report to said Joint Committee wherein he, as the Government's only Site Agent, recommended as his First Choice a site other than the public property sought to be condemned (R. 158, 159). Item II (App. pp. 2-a, 3-a, 4-a).

Bearing upon the question of suitability of site in question, we here call attention to Report and Recommendations of the Government's only Site Agent hereinabove quoted from (ante pp. 12-13).

In the first opinion of the Circuit Court of Appeals, which was unanimous, the Court found in favor of this respondent and against the petitioner herein. On remand the District Court found in favor of this respondent and against petitioner herein. The petitioner appealed from that judgment and the Court below, in a unanimous opinion, affirmed the judgment of the District Court, and petitioner now asks this Court to review the undisputed facts in this Record for the fourth time.

ARGUMENT.

I.

The matters at issue in the within cause were correctly decided by the Circuit Court of Appeals when it affirmed the judgment of the District Court in favor of respondent and against the petitioner, on the ground that the Act of May 25, 1926, c. 380, 44 Stat. 630, as amended by the Act of July 1, 1939, 53 Stat. 1426, 1427, Title 40 U. S. C. 341, under the record in this case, did not confer upon the Public Works Administrator and the Postmaster General the power asserted in this case by petitioner to condemn the particular land in question.

In referring to the basis of this suit, the Court below correctly stated the undisputed facts in this Record, as follows:

> "The evidence also established that, prior to the institution of the condemnation proceeding, certain agents of the Public Works Administrator and officers of Cape Girardeau had conceived the idea of an exchange of the park property for the present Federal building and the land on which it is situated, and that negotiations between them to that end had culminated in the proposed agreement between them for the exchange of property. As stated above, this proposed agreement was the moving cause for the selection of the park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. This exchange was to be consummated eventually by the

acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings. The facts set out above are sufficient, we think, to distinguish this case from **C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372,** and like decisions.

The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in **Oklahoma v. Atkinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. (2d) 636, 639.** For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, par. 301-303, effective July 1, 1939, 53 Stat. 1426, 1427; 40 U.S.C.A., par. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise in the District of Columbia and in the several States sites and additions to sites, and cause to be constructed thereon adequate and suitable buildings for the accommodation of various departments of the Government. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States for post offices, court houses, and custom houses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions" (R. 662, 663) [151 F. (2d) 881, 883].

The Act of May 25, 1926, cited and relied upon by petitioner, provides, in part:

> "To enable the Federal Works Administrator to provide suitable accommodations * * *, court houses, post offices * * *, and other public buildings of the classes under the control of the Federal Works Agency in the states, territories and possessions of the United States, he is hereby authorized and directed to acquire by purchase, condemnation or otherwise, such sites and additions to sites as he may deem necessary * * *. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Federal Works Administrator to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quit claim deed of conveyance: * * *"

In referring to this Statute, under the undisputed facts in this case, the Circuit Court of Appeals said:

> "* * * The facts set out above (in the opinion) are sufficient, we think, to distinguish this case from **C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372,** and like decisions."

Continuing the reference to the lack of authority to condemn, under the Record in this case, the Court said:

> "The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in **Oklahoma v. Atkinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. (2d) 636, 639.** For the authority asserted in the present case the Govern-

ment relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, Secs. 301-303, effective July 1, 1939, 53 Stat. 1428, 1427; 40 U.S.C.A., Sec. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise in the District of Columbia and in the several states sites and additions to sites, and cause to be constructed thereon adequate and suitable buildings for the accommodation of various departments of the Government. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States for post offices, court houses, and custom houses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions."

"If the Act relied on by the United States should be held to confer upon the Public Works Administrator and the Postmaster General the power asserted in this case, it would subject the States and their political subdivisions to an interference with necessary local governmental functions at the decision of Federal administrative officials, with possible unfortunate and unnecessary conflicts between State and Federal authority. We find no basis in the Act relied on by the Government for attributing to Congress any such intent" (R. 663, 664). [151 F. (2d) 881, 883.]

II.

Petitioner abandons the theory upon which it tried this case in the courts below in its Petition for Writ of Certiorari filed herein, and we respectfully submit it is without merit and should be denied.

Respondent will here discuss the three questions presented in the Petition (Petition p. 2) in the order there set out.

The first question presented in the Petition for Writ of Certiorari reads as follows:

> "1. Whether, under the statute authorizing the Federal Works Administrator, acting jointly with the Postmaster General, to condemn for post offices such sites 'as he may deem necessary', a petition to condemn property already devoted to public use may properly be dismissed on the grounds that, in the opinion of the Court, the selected site is not necessary for the public project because other sites are available, condemnation of the selected site will interfere with local governmental functions, and the property is held in trust for the specific purpose to which the land is being devoted." (Note: This question is now Number II in Brief of Petitioner, U. S. Br. 2.)

This question ignores the Stipulation of Agreed Facts (R. 157, 160) (App. pp. 1a-11a).

The present public uses (referred to in Question 1 of the Petition) of proposed site are stated in the first opinion by the Circuit Court of Appeals in this case [135 F. (2d) 196, l. c. 198], which is the identical description of present public uses of proposed site found in the Stipulation of Agreed Facts (App. pp. 2a-4a). The Court below also set out a full description of the present public uses of the proposed site in its opinion in this case [151 F. (2d) 881-883] (R. 660, 661).

This question wholly disregards the facts that the law to be applied to the facts of this case is the law of the State of Missouri with respect to the power of the city to exchange or convey the property here involved.

> The Board of Regents for Normal School District No. 3 v. Painter, Appellant, 102 Mo. 464, 14 S. W. 938.

In The City of Defiance v. McGonigale, 150 Fed. 689, the Circuit Court of Appeals, Sixth Circuit, in referring to the opinion of the Supreme Court of Ohio, said:

> "Whether those views were correct or not we need not and should not inquire, inasmuch as the force and effect of an adjudication do not depend upon the soundness of the judgment rendered. This general and well settled proposition is referred to in **Case v. Beauregard, 101 U. S. 688, 25 L.Ed. 1004,** and in **Jeter v. Hewitt, 22 How. 352, 16 L.Ed. 345,** where it was stated that res adjudicata renders white that which is black. The opinion of the Ohio Supreme Court covered and expressed the views of that Court upon the litigation then before it, and we do not feel at liberty to disregard them in this case, especially as our notion of the merit of the objections of the city to paying for the water it used are quite in accord with what we concede to have been those of the Supreme Court of Ohio."

Let it be observed that the Circuit Court of Appeals in this case, **Carmack v. United States, 135 Fed. (2d) 196,** l. c. 199, said:

> "The Record shows wihout a dispute that the property has been devoted to public use not alone because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose."

The second question presented by Petition (p. 2) reads as follows:

> "Whether, under the facts of this case and particularly in the light of the approval of local public officials and a majority of local voters, the selection as a site for a federal post office of property used for a city park and court house was arbitrary and capricious." (Note: This question is now Number III in Brief of Petition. U. S. Br. 2.)

In the second question presented, the petitioner takes the position that the proposed exchange of properties prohibited by Missouri law is not arbitrary and capricious in the light of the approval of local public officials and a majority of local voters. The District Court, in referring to the matter of local approval, said:

> "We note there was offered in evidence the proceedings leading up to and the holding of an election on the Park site. The evidence is of little value to the issues. Only one site was submitted to the voters and that was presented as a question of the City making the trade discussed heretofore. Such procedure could not give legal effect to a transaction the City was powerless to perform" (55 Fed. Supp. 555-563) (R. 600, 632).

Furthermore, the answer of respondent Carmack (R. 10) shows that respondent appeared for herself and other heirs similarly situated and the Record in this case reveals that there was a referendum petition signed by over 2,000 citizens of Cape Girardeau protesting against proposed exchange of property (R. 444), was ignored by the City Officials. These signers were in addition to the protest set out in the Deutsch Report and Recommendations.

The District Court, in referring to this matter, said:

> "* * * It is doubtful if any site is ever selected that is acceptable to all residents of any town or city. Certainly the evidence shows a very sharp division of opinion in Cape Girardeau on the selection of the site here under consideration. This has been the case from inception of the project and will, no doubt, continue to the end * * *" (55 Fed. Supp. 555, 563) (R. 600, 616).

This question is based upon the alleged approval of local public officials and an alleged election. The petitioner wholly ignores the following facts:

(1) Resolution of County Court of Cape Girardeau County protesting against disposiiton of court house park site and building (R. 462) (App. pp. 19a, 20a).

While it is true that the County Court of Cape Girardeau County undoubtedly recognized the fact that the title is held in trust, as declared by the Supreme Court of Missouri in the case of **Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938,** disclaiming any interest in the title to the real estate involved (R. 38), yet the County Court did protest against the disposition of the property in this proceeding as was its duty under the law as declared by the Supreme Court of Missouri in the Painter case. The resolution of the County Court protesting against this proceeding is printed in full in the Appendix (App. pp. 19a, 20a).

(2) This question wholly disregards the fact that respondent appeared in this proceeding in response to a summons and filed her answer for herself and others similarly situated (R. 10). The Record shows that there was a referendum petition signed by over 2,000 citizens of Cape Girardeau protesting against the proposed ac-

change of property (R. 444). This protest was ignored by the officials of the City of Cape Girardeau.

The third question presented by petitioner (p. 2) reads as follows:

> "Whether a taxpayer, property owner, and heir of the grantor to the city of the property sought to be condemned, has standing to object to the taking when she has no property interest in the land." (Note: This question is now Number I in Brief of Petitioner. U. S. Br. 2.)

In the third question thus presented as to the right of respondent to assert the defenses alleged in her answer, this matter was disposed of on the first appeal and accepted by petitioner and is not now properly a question before this Court **[Carmack v. United States, 135 F. (2d) 196, l. c. 199]**.

The position of petitioner with respect to the issues involved and the procedure adopted after remand is set forth in a letter from **Assistant Attorney General Littell**, to the United States Atorney at St. Louis, Missouri, dated July 23, 1943, in which **Mr. Littell**, among other things, said:

> "You are advised that the Solicitor General has decided that application should not be made for a Writ of Certiorari * * * (R. 94).
>
> It will be recalled that the Circuit Court of Appeals held that right to determine what is a public use and when there is a public necessity for taking specific property is, in the first instance, a legislative rather than a judicial question, but whether in carrying out the purpose of Congress the officer has acted capriciously or arbitrarily is a judicial question, and that this issue should have been determined by the District Court. This department feels that this issue should be raised by the defendant, testimony taken if the Court desires it, and the question decided by

the Court. It also appears to this department that the best evidence to offset the contention that the selection was arbitrary or capricious is the report made by **M. J. Deutsch**, dated August 20, 1940 * * *" (R. 94, 95).

Let it be observed that on the second trial of this cause in the District Court the theory of the petitioner as to the framing of the issues involved, and the taking of testimony, was adopted by the petitioner. The second trial was conducted in all respects as directed by the petitioner consistent with the first opinion of the Court of Appeals.

In the third question (page 2 of petition) presented as to the right of respondent **Carmack** to assert the defenses alleged in her answer, this matter was disposed of on the first appeal, and accepted by petitioner and is not before this Court.

> **Carmack v. United States, 135 F. (2d) 196, l. c. 199; Mott v. Morris, 249 Mo. 137, 155 S. W. 434, 438.**

In support of the respondent's above proposition we here call attention to the following authorities:

> "Questions presented by a petition for certiorari should not be answered where based upon a state of facts not presented by the instant case."
>
> **General Talking Pictures Corporation v. Western Electric Company, 305 U. S. 124, 125, 83 L.Ed. 81, 82 (Headnote 1).**

> "It is elementary that the Court is not bound to determine questions which have become academic."
>
> **Ford Motor Company v. National Labor Relations Board, 305 U. S. 364, 375, 83 L.Ed. 221, 230, 231.**

All proceedings on the second trial of this case after remand (R. 658) as stated in 151 F. (2d) 881, are consistent with the first opinion of the Circuit Court of Appeals, remanding this cause for further proceedings consistent with that opinion. **Carmack v. United States, 135 F. (2d) 196.** The petitioner accepted the Findings of Fact stated in the first opinion of the Circuit Court of Appeals. [135 F. (2d) 196], and also accepted the law governing the right of the Government to condemn the particular property described in the condemnation petition in the circumstances presented in this case as declared by the Court of Appeals on the first appeal [135 F. (2d) 196]. And petitioner proceeded with the second trial of this cause in the District Court after remand (R. 600-618) reported in 55 Fed. Supp. 555, in a way entirely consistent with said opinion [135 F. (2d) 196], reversing and remanding this cause for further proceedings.

II-a.

The specifications of errors to be urged by petitioner (P. 9) are merely a restatement of the questions presented, and are also void of merit. A discussion of the specifications of errors is merged in the discussion of the undisputed facts in this case and the law applicable thereto: We here call particular attention to the deed relied upon by petitioner; terms or expressions "common," "public square," and "park"; resolution of the city officials with respect to the offer to exchange properties; and also discuss the authorities relied upon by petitioner not applicable to the facts in this case.

(1) Facts ignored:

A. The deed of 1807 by **Louis Lorimier** to the District of Cape Girardeau (R. 99) referred to in the United States' Brief (U. S. Br. 5) designates the land dedicated as "common," a fact overlooked by petitioner. This deed has no bearing upon any of the issues in this case other than to show the intent of donor, **Louis Lorimier,** in his deed of 1807.

B. The deed relied upon by petitioner in this proceeding is the deed of 1820 executed by the heirs of **Louis Lorimier** to the inhabitants of the town of Cape Girardeau dedicating several tracts for particular public uses, including the one involved here (R. 106). This deed in dedicating the land sought to be condemned in this proceeding describes the land as "**the place known and designated in the plan of said town as the 'Public Square'** bounded * * *." The deed of 1820 further recites that "provided always that the several tracts or parcels of land thus granted to the town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property." The intent of donors is clearly apparent. They intended to dedicate the "Public Square."

C. The lands referred to in the Lorimier deed of 1807 as "common" and in the Lorimier deed of 1820 as "Public Square" is referred to in the report of **M. J. Deutsch,** the Government's only Site Agent, as the site, "known as the City Park Site." (R. 175). In other words, the land in question has always been referred to, since the date of the Loromier deed in 1820, as the public square or city park. The public officials, and all others who

testified in this proceeding, referred to the land in question as the city park. It is perfectly obvious from this record that the term or expression "common" used in the Loromier deed of 1807, the term "Public Square" used in the deed of 1820, and the term "park" used throughout this Record in referring to the land sought to be condemned, are, under the facts in this Record, treated as synonymous. (See, 39 A. J. Sec. 2, pp. 803, 804.)

Let it be observed that the Resolution by the city officials of the City of Cape Girardeau (R. 448) makes no mention or reference of any kind to the use of the property as a public square, common, or court house park. The offer to exchange, for reasons not disclosed in this Record, did not advise the government that the property in question was devoted to the public uses described in this Record. The language used in the opinion of the District Judge, bearing on this question, is significant. The District Judge (R. 603) said: "There is no evidence that either the Postmaster General or the Administrator of the Federal Works Agency were ever informed or even now know that the site selection that bears their signatures (U. S. Ex. 4) described land that is a public park or that the land was devoted to any public use—except for a 'library building.' As to the library building, they had no knowledge as to its being subject to removal on '30 days' notice'." (R. 603.) (55 F. Supp. 555, 557.)

(2) Law applicable to the facts in this case disregarded by petitioner.

A. The Missouri Courts' construction of the deed executed in 1820 by the Lorimier heirs dedicating the property in question is, under the decisions of this Court, binding on the federal courts. **Thompson v. Magnolia Co., 309 U. S. 478, 484.**

In the case of **Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487,** the Supreme Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to any state, whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."

In the case of **Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Amer. Decisions, p. 95, at p. 98,** the Court said:

> "In this State there are few ancient towns in which squares such as this, do not form part of the plan. They are generally located at the intersection of the streets; and are intended as sites for the erection of buildings for the use of the public, such as court-houses, market-houses, school-houses and churches; Sometimes they are designed for ornaments; and at others, they are intended for promotion of the health of the inhabitants, by admitting a free circulation of air. The squares as well as the streets, and for the same reason, are placed under the superintendence of the local authorities, who have full power to regulate them, so as more effectually to answer the purpose to which they have been dedicated.

Further on in said opinion, the Court said:

> "For although the city has a qualified property in the ground, yet the corporation is but a trustee of the public, for whose use and benefit the squares were left open. The enjoyment of them is free, as things of common right, to all the citizens of the

commonwealth; subject, however, as I before observed, to such regulations and restrictions affecting all as are not inconsistent with the grant."

In Lowe v. The Board of Commissioners of Howard County, 94 Ind. 553, the Court said:

"The term 'public square' has acquired a legal meaning and courts adopt that meaning in all cases where the term is not shown by the language with which it is associated to have a different signification. The public square of a county is property of a public nature, held for governmental or public purposes (citing authorities). The general rule is that the property of a public corporation held for governmental purposes cannot be sold under any legal process. Property of this description cannot be sold on execution."

Let it be observed that the Lorimier deed of 1820 relied upon by petitioner in this proceeding designates the property in question as "the place known and designated in the plan of said town, as the Public Square, bounded * * *." (R. 106.)

In the case of **Woodard v. City of Des Moines, 182 Ia. 1102, 165 N.W. 313,** the Court had under consideration Section 753 of the Code of that State which provided that the city should have the care, supervision and control of all public highways, streets, avenues, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances. The Court said:

"It is true that the word 'park' or 'parks' is not found therein, but we think without doubt the same idea is to be found in the words 'public squares' and 'commons.' The word 'park' as applied to pleasure grounds and places or open spaces for public use, or

public recreation owned by towns and cities, is very largely one of quite modern usage, and until recent years such places were in popular speech spoken of as squares and commons, and it is quite clear that the quoted section of the Code is the source of both municipal authority and municipal obligation with respect to public parks. It will be noted that the legislature has classed them in the same section with highways, streets, avenues and alleys, and that the duty of the city as to the care of one is no less imperative than it is its duty with respect to the others."

In **City of Defiance v. McGonigale, 150 Fed. 689,** the Circuit Court of Appeals followed the law declared by the Ohio courts. The Court said:

"* * *. With the opinion of the Supreme Court of Ohio before us, what we do is to accept it and the judgment expressly based thereon as binding in this particular case, where the law of Ohio is in question, and, upon a principle analogous at least to that of res adjudicata to hold that the plaintiff in error is not at liberty at this late day under all the circumstances of this case to defeat the payment of the demand sued on by the third defense set up in the answer; and, as this is conclusive of the case, we affirm the judgment of the Circuit Court, with costs."

(3) Law relied upon by petitioner is not applicable to the facts in this case.

A. In the case of **Tyler v. Judges of Court of Registration, 179 U. S. 405,** cited and relied upon by the petitioner, the Court was considering a boundary line question. The question in that case was whether the proceedings under the state law provided for by statute deprived persons of their property without due process of law. The facts in the Tyler case, supra, are wholly different from the facts in the instant case, and what is said in that case has no application here.

In the case of **Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251,** cited and relied upon by the petitioner, the Court was called upon to notice and rectify any error that may have occurred in the interlocutory proceedings, and, of course, what is said in the Hamilton-Brown Shoe Company case, supra, is clearly not in point for any purpose under the facts of the instant case.

In the case of **United States v. Miller, 317 U. S., 369,** cited and relied upon by the petitioner, the issue under consideration was merely a matter as to whether the rule of the state should be followed in arriving at a fair market value of land condemned by the United States Government; and what is said in the Miller case, supra, could not affect the questions presented by petitioner in the instant case.

In the case of **Benitez v. United States, 141 F. (2d) 943,** the Court was considering a proceeding commonly referred to as the farmer-debtor's petition, and upon a hearing in that case the Court held that the appellant was not a farmer and that the bankruptcy court had no jurisdiction to entertain the petition. The Court pointed out that the authorities "much relied upon by appellant, are not in point because there the petitioners under Section 75 were undoubtedly farmers entitled to the protection of the Act." The Benitez case is obviously not in point under the facts in the instant case.

Chouteau v. City of St. Louis, 331 Mo. 781, 55 S. W. (2d) 299, cited and relied upon by petitioner, is bottomed upon an Act of the Legislature of the State of Missouri passed on December 14, 1882. Under this special Act Chouteau and others conveyed certain property to the City of St. Louis for a courthouse site. The Court, in passing upon the rights of Chouteau and others under

the deed, executed under the special Act of the Legislature, said: "They (Chouteau and others) were dealing with the State under a Special Act of the Legislature of Missouri, the terms of which called for the conveyance of the fee." The Court points out that the grantors in the Chouteau case knew at the time they executed the deed that they were required by the Act to convey the property in fee simple under the terms of the Act.

III.

The decision of the Circuit Court of Appeals that under undisputed facts in this record, the Act of Congress relied on by the petitioner did not confer upon the Public Works Administrator and the Postmaster General the power asserted in this case, is not in conflict with the decisions of any other Circuit Court of Appeals, nor with any decision of this Court.

There is no conflict between the decision in this case and **C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372,** and like decisions.

The petitioner contends that the decision of the Court below is in conflict with decisions of other Circuit Courts of Appeals and also in conflict with decisions of this Court governing the right of petitioner to condemn for a Post Office site the particular property involved in this case. The facts in those cases were entirely different from the facts in this case. It is necessary for respondent to call attention to the undisputed facts in this voluminous Record which show conclusively that an illegal and void agreement for the exchange of properties is the basis of this suit.

The reason or excuse for selecting the site described in the Government's Petition for Condemnation is not based upon the merits or advantages of the particular land selected, but is bottomed entirely upon an offer by the City Officials for an exchange of property (R. 162) (App. p. 7a).

The Court below in referring to this matter, among other things, said:

> "* * * As stated above, this proposed agreement (for an exchange of properties) was the moving cause for the selection of the Park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power, but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. This exchange was to be consummated eventually by the acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings." **[United States v. Carmack, 151 F. (2d) 881, 883]** (R. 662, 663.)

In referring to the authorities relied upon by petitioner in the Court below and in this Court, the Court of Appeals said:

> "* * * The facts set out above are sufficient, we think, to distinguish this case from **C. M. Patten and Co. v. United States, 9 Cir., 61 F (2d) 970; United States v. Certain Parcels of Land, D. C., 30 Fed. Supp. 372**, and like decisions.
>
> The Government points to no specific legislative grant of authority to take the land involved in this proceeding such as was present in **Oklahoma v. At-**

kinson Co., 313 U. S. 508, 534; State of Minnesota v. United States, 8 Cir., 125 F. (2d) 636, 639. For the authority asserted in the present case the Government relies upon the General Acts of Congress of May 25, 1926, 44 Stat. 630; Reorganization Plan No. 1, par. 301-303, effective July 1, 1939, 53 Stat. 1426, 1427; 40 U. S. C. A., Sec. 341, conferring upon the Federal Works Administrator authority to acquire by purchase, condemnation, or otherwise * * *. We think it may not be said that Congress, in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of building * * *, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, but also held in trust for this specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions." **[United States v. Carmack, 151 F. (2d) 881, 883]** (R. 663, 664).

The **first step** in this proceeding was the letter dated November 26, 1940, from the Mayor of the City of Cape Girardeau, to the Commissioner of Public Buildings, Federal Works Agency, Washington, D. C., submitting a proposition for an exchange of the property involved in this proceeding for the present Post Office and Federal Court Building in the City of Cape Girardeau. (R. 76.)

The **second step** in this proceeding was a letter from **Neal A. Melick**, Acting Administrator of Public Buildings, Washington, D. C., dated May 26, 1941, accepting the proposition of the City of November 26, 1940, for an exchange of the property in controversy for the present Federal Building and site. (R. 63.)

The **third step** was a letter from **John N. Edy**, Acting Administrator, dated September 25, 1941, requesting the Attorney General to institute proceedings for the condemnation of the particular land, stating, among other things, that:

> "Under authority of the above cited legislation this Agency entered into a contract with the City of Cape Girardeau, Missouri, for the exchange of the present Federal Building and site, hereinafter described, for a tract of land as a new Post Office and Custom House site also hereinafter described." (R. 58.)

In referring to said letter signed by **John N. Edy**, Acting Administrator, **Paul Emmert**, Assistant General Counsel, Federal Works Administration, said:

> "He **(John N. Edy)** acted as indicated, that day he just happened to be the Acting Administrator that day and signed whatever papers were put on his desk for signature. **Mr. Edy**, in addition to his other duties acted as Administrator in the absence of the Administrator at that time." (R. 290.)

The **fourth step** was the letter from the Attorney General to the United States Attorney at St. Louis, dated October 16, 1941, which states that:

> "It is contemplated that compensation for the taking of the land shall be made by conveyance of the present federal building to the City of Cape Girardeau." * * * (R. 92.)

Walter F. Meyers, Fourth Assistant Postmaster-General, testified in the District Court, in part, on examination by the Court, as follows:

> "**The Court: Did you reach your conclusion on the theory the City would convey title to this land?**
>
> "A. **Yes**, sir; I read the cases that had been pre-

sented, and I was of the opinion that the opposing view was not correct. I had practiced law for thirty years myself and thought that might mean a little something." (R. 131.)

In this connection it should be borne in mind that neither the City Officials nor the Government Agents in their negotiations for an exchange of property contemplated the destruction of the Public Library building, which petitioner now concedes must be removed by the city on thirty days' notice. (Letter of Acting Commissioner of Public Buildings. [R. 63.] See also Appendix, 5-a). In referring to this matter, the Fourth Assistant Postmaster-General testified, in part, as follows:

"Q. Do you know whether the original plan for the condemnation of a part of the Park and court house contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site." (R. 137.)

The Record further discloses the fact that the architects in their report complained that the Public Library Building would detract from the new building proposed to be erected on the land in controversy. But in writing the contract for an exchange of properties a description of the real estate to be acquired included the land on which the Public Library Building is located. The plats of the petitioner show that that land was included. (R. 77, 89, 499.)

In the light of the above facts we desire to call attention to the fact that the petitioner in its Brief at page 15 cites **United States v. City of Tiffin, 190 Fed. 279 (C.C.N.D. Ohio)**, in support of the petitioner's statement that:

"The decision in the instant case stands alone in

requiring specific Congressional authorization to condemn property already devoted to some public use when, in the Court's opinion, the taking is not necessary, and in thus unnecessarily burdening the exercise of the sovereign power."

In the City of Tiffin case, supra, the Government sought to condemn a portion of a public alley for a post office site. The Court, at page 280, said:

"The United States has paramount authority in the matter of taking any property within its borders for those public uses which are within the constitutional reservations to the general government."

But the Court further stated in the same paragraph, a principle overlooked by the petitioner, as follows:

"This does not mean, however, that no power may intervene to prevent arbitrary action, for such power certainly abides with the courts." (Emphasis ours.)

In that case the trial Court was ruling on a demurrer to the petition. The concluding paragraph of the Opinion (190 Fed., loc. cit. 282) is as follows:

"We believe that all there is in this case is for a determination by judicial consideration of the comparative importance of the contending public uses involving this plot of ground **[In re Certain Land in Lawrence (D. C.), 119 Fed. 453]**, and that the demurrer should be overruled with exceptions."

In the Lawrence case, the Court (119 Fed., loc. cit. 456) said:

"The legislature is the sufficient judge of the relative importance of the two uses. If there is no express legislative provision, the relative importance of the two uses is to be determined by the Court. If the later use is deemed by the Court, under all the cir-

cumstances, to be more important than the earlier, the land is taken for the later use without compensation for the loss of the earlier. If the earlier use is deemed the more important, the later is forbidden and the earlier continues.

We come next to the application of these principles to the facts of this case. There is here no express provision of the statute. I do not believe that the United States could, at its will, build this post office in the middle of the principal street of Lawrence or across the main line of an important railroad * * *. I doubt if it can be laid down, without qualification, that the public use of a post office is in all places superior to the public use of a park. That it is so in the case at bar appears probable from what appeared incidentally at the argument, but the issue was not then raised, and cannot be determined without further hearing, if the City desires to be heard."

In re Certain Lands in Lawrence, 119 F. 453, l. c. 466.

The petitioner also on page 17 says, "Arbitrary or capricious means in bad faith or according to one's own will or pleasure, without adequate determining principle," and in a note cities several cases in support. **Fox Film Corporation v. Trumbull, 7 F. (2d) 715, 727,** does not even remotely hold or imply that "arbitrary or capacious means in bad faith." The Court in that case did, however, state a principle directly applicable and significant (page 728), as follows:

"If the commissioner * * * abuses his discretion, and acts in an arbitrary and capricious manner, and contrary to the plain intent of the statute, there remains the right to appeal to the courts which exists under the general principles of jurisprudence. As was said in **Bradley v. Richmond, 227 U. S. 477, 483, 33 S. Ct. 318, 320, 57 L. Ed. 603, 'there would, under gen-**

> **eral principles of jurisprudence, remain the right to judicial review if the result should violate either a right secured under the law of the state or that of the United States'." (Emphasis added.)**

The Court below said there is no conflict between C. M. Patten and Co. v. United States, 9 Cir., 61 F. (2d) 270, and like decisions. In referring to the inherent right of the Government to condemn, the Court, in the C. M. Patten and Co. case, supra, at page 972, said:

> **"However, this right of the Federal Government to condemn is subject to the power of the courts to intervene and prevent arbitrary and unnecessary action which must be determined by the facts in each particular case." (Emphasis added.)**

In referring to the facts in the Patten case, the Court in that case further said:

> **"Recognizing, therefore, the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the Government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved." * * * (Emphasis added.)**

The Court, in the Patten case, referring to the site involved in that case, further said:

> **"The site involved possesses special and superior advantages as regards the government departments and the general public which no other available site affords,** as it is surrounded on three sides by public streets and on one side by a public park, and is a conspicuous site along the harbor channel in full view and touch with the harbor activities, enabling those concerned with government inspection of other governmental departments to gain prompt and convenient access to the federal building, such as immigra-

tion, quarantine, steamboat inspection, and customs. It is nearer the railway passenger station, street car and interurban lines, and the close railway tracks paralleling the plaza affords opportunity for the installation of a conveyor system by means of a subway and tunnel to transfer the mails to and from the railway mail cars and the post office, which is a saving in time and expense. **There appear other advantages near the seat of operation which the site has in the way of location as regards both governmental departments and the general public which are more necessary and a greater public use than a small part of a plaza.** This conclusion was reached by the trial court and is sustained by the weight of the evidence." (Emphasis added.)

In referring to the site sought to be condemned in this case, the District Court (55 Fed. Supp. 562) (R. 615) said:

> **"Here a valuable city park and its present public uses will be destroyed if plaintiff condemns the park site. The city has given bond to remove by wrecking or otherwise, the present Common Pleas Court House, where court is held; the building is also used for the city government. Certainly during the course of construction of the new buildings, judicial administration will be affected. There appears to be no definite arrangements for the Court of Common Pleas insofar as this Record is concerned. There is no suggestion for the future of the public library and the building in which it is located—other than removal of the building 'on thirty days notice'. There is no necessity for the destruction of these public services, conveniences and improvements. Necessity is not even claimed by the plaintiff."** (Emphasis added.)

The Courts below properly found that the facts in this Record are sufficient to distinguish this case from the cases relied on by counsel for the petitioner.

IV.

The Record supports the finding of the District Court that the Administrator of Federal Works Agency and the Postmaster-General acted arbitrarily and capriciously in selecting the proposed site.

It is conceded in this Record that no joint selection of the site in question had been made prior to the filing of the original Petition in Condemnation in this case. As a matter of fact, the Record discloses that no joint selection was made until after the Court of Appeals reversed and remanded the cause on the first appeal. **Carmack v. United States, 135 F. (2d) 196.** In referring to this matter, the District Court said:

> "* * * Since the decision of the Court of Appeals, holding that proof of joint selection was a jurisdictional fact, the two public officers referred to have executed a site selection of the land described in the petition.
>
> **"There is no evidence that either the Postmaster General or the Administrator of the Federal Works Agency were ever informed or even now know that the site selection that bears their signatures (U. S. Ex. 4) describes land that is a public park or that the land was devoted to any public use—except for a 'library building'. As to the library building, they had no knowledge as to its being subject to removal on thirty days' notice" (United States v. Certain Land, 55 Fed. Supp. 555, l. c. 557) (R. 603).** (Emphasis added.)

In **United States v. 43,355 Square Feet of Land, 51 F. Supp. 905,** in deciding that the property had been capriciously and arbitrarily selected, the Court said (loc. cit. page 909):

"In making these observations and stating these

findings and conclusions the Court does not say or imply that any particular officer of the Government or any particular military man has gone out with a deliberate attempt to act facetiously with respect to the public generally. So far as I know each inspector and appraiser of this property may have done every act that he did in response to the order of some superior located in some other place.

The Court's conclusions relate to the situation as a **matter of law, not** as a matter of any express design going **to the question of proper, lawful or other kind of motives** of the particular official or military man who may have made an appraisal or an inspection or a report." (Emphasis added.)

At page 909 of the opinion in that case (51 F. Supp. 905) referring to the opinion of the Court in the Carmack case, supra [135 F. (2d) 196], the Court said:

"(9) This Court believes that the opinion of the Eighth Circuit Court of Appeals in that case applies to the situation in the case before the Court here, where the Government's position in effect is that, as to administrative acts of Government War Department officials under the Second War Powers Act, 50 U.S.C.A. Appendix Section 631 et seq., there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials."

In **Baisden v. Floyd County Board of Education, 270 Ky. 839, 110 S. W. (2d) 671, loc. cit. 673**, the Court, in referring to the duty to inquire as to whether the act of a Board was arbitrary, said:

"While this Court cannot question the motives of the Board in removing one who is delinquent in his

statutory duties (Board of Education v. Stephens, supra), we can and will upon review inquire as to whether the act of the Board was arbitrary; we may determine what was right and equitable under the circumstances; whether the act was directed by reason and in good conscience. **Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S. W. (2d) 356.** In its legal significance an act is arbitrary when it is done in an arbitrary or capricious way; without adequate determining prinpicle; not founded in the nature of things. **King v. Falls County (Tex. Civ. App.) 42 S. W. (2d) 481.** When we come to consider the action of the Board in removing appellant, we are forced to the conclusion that the removal was not based on sound reason or in the exercise of good judgment; it was neither right nor equitable, since we conclude that the reasons set forth in the affidavit and petition measure up to our idea of 'satisfactory' reasons for appellant's non-attendance at the three meetings."

Respondent believes that this Court will give consideration to State Court decisions for in **New York Rapid Transit Corp. v. City of New York, 303 U. S., 573, loc. cit. 593,** in referring to the matter of construing a contract, the Court said:

> "But, of course, in so doing we 'lean toward agreement with the courts of the State, and accept their judgments as to such matters unless manifestly wrong.'"

The District Court (R. 610) in discussing the position now taken by petitioner in this case (55 Fed. Supp., loc. cit. 560), said:

> "3. We conclude from this record that the plaintiff (petitioner herein) **concedes** in this case that the selection of the site described in the petition, **'was on the basis of exchange of the present Federal Building**

and site thereof' for the city park site described in the petition, **as the result of the agreement between the city officials and the plaintiff.** In doing this did the Joint Committee base their act on a false premise, namely: a mistake of law; the law governing the right of the city to sell or exchange the whole or any part of the park site?" (Emphasis added.)

The Court there quotes Item VI. of the Agreed Statement of Facts, the agreement to exchange property (R. 162) (App. p. 7a).

Again, at page 561 of the Opinion (55 Fed. Supp. 555, 568), the District Court (R. 613) said:

"We believe the action of the Joint Committee, in the proceeding under a mistake of law, is decisive of this case adverse to the plaintiff, but we do not base our holding on that point alone.

The cause must be considered under those rules of law applying to condemnation proceedings under a general act, which does not specify any certain property shall be condemned * * *."

The District Court (R. 615) also said: "Here a valuable city park and its present public uses will be destroyed if plaintiff condemns the park site. The city has given bond to remove by wrecking or otherwise, the present common pleas court house, where Court is held; the building is also used for the city government. Certainly during the course of construction of the new building, judicial administration will be affected. There appears to be no definite arrangements for the Court of Common Pleas in so far as this record is concerned. There is no suggestion for the future of the public library and the building in which it is located—other than removal of the building 'on thirty days' notice.' There is no necessity for the destruction of these public services, conveniences and improvements. Necessity is not even claimed by the plaintiff.* * *

Nowhere in the record do we find any claim by plaintiff that the site proposed is the only available property, reasonably fitted for the public project, or that failure to secure it would result in failure of the project.

Upon the record this Court cannot find that the site described in the complaint is the only available property, reasonably fitted for the public project, when the plaintiff's own representative, chosen because of his knowledge and ability to select sites, has placed another site superior in desirability to the site sought. With this admission of plaintiff's representative this Court cannot find that the failure to secure the site described in the petition would result in failure of the public project. These facts support defendant's position in this case. Nor was there the slightest effort made in this case by the plaintiff to show a necessity for taking the particular property here involved, already devoted to a public purpose. On the contrary the evidence is undisputed and comes from an unimpeachable source, the government's witnesses, that there is no necessity for taking the particular property described in the petition. That another location is preferable is an unchallenged fact in this case. Consequently there can be no necessity by implication. Plaintiff proceeding under a general act, its case must fail for that reason also.

The plaintiff is content, or rather forced to be, to rest its case solely upon the right of the city to sell or trade the park property, coupled with the rule that selection of the site by authorized officers carries an assumption that the decision was based on facts justifying the action taken, until the contrary be shown. The contrary has been shown in this case." (Emphasis added.)

With respect to the contention of petitioner that the Courts below passed upon the question of the good faith of the parties, we here call attention to the language of

the District Court bearing on this question at page 563 in this case, **United States v. Certain Lands, etc., 55 Fed. Supp., 555, 563.** (R. 617.):

> "* * * The city officials of Cape Girardeau, no doubt acting in perfect good faith, represented to plaintiff or the Joint Committee on site selection, that the city had a legal right to sell or exchange the park site. Also acting in perfect good faith the officials of plaintiff and the Joint Committee 'relied' upon the representations of the Cape Girardeau city officials as to their legal right to sell or exchange the park site, and the Joint Committee so relying, 'based' their decision as to site selection, upon such erroneous representation. The City of Cape Girardeau being without a legal right to sell or exchange the park property, as held by the Supreme Court of Missouri and in the opinion in this case by the Federal Court of Appeals, leaves the action of the Joint Committee in selecting the park site in the same status, as a matter of law, as if no exchange negotiations had taken place, and the plaintiff's officials had never been induced to consider the site upon the basis of the proposed exchange."

The District Court then cited the case of Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S.Ct. 364, 81 L.Ed. 510, where this Court, at page 69 of said Opinion, held:

> "It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise. * * * The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property."

The Circuit Court of Appeals, after reciting the facts in this Record, said:

"As stated above, this proposed agreement (agreement for an exchange of properties) was the moving cause of the selection of the Park as the site for the Federal Building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the property, **the present proceedings for condemnation of the site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made." [United States v. Carmack, 151 F. (2d) 881, 883.]** (R. 662.) (Emphasis added.)

V.

The City of Cape Girardeau Has No Authority to Contract to Convey Land Involved.

To show that the invalidity of the purported agreement is vital and very important in this case, we call the Court's attention to a case wherein the City of Kennett, Missouri, executed a contract with the United States which it had no authority to make under the laws of the State of Missouri, **Ark.-Mo. Power Co. v. City of Kennett, Mo., 78 F. (2d) 911.** In discussing the right of the defendant in that case to have a contract declared void, the Court made the following statement (l. c. 922):

"Revised Statutes of Missouri 1929, Sec. 2962 (now Revised Statutes of Missouri 1939, Sec. 3349), provides that no * * * city * * * or other municipal corporation shall make any contract unless the same shall be within the scope of its powers or be expressly authorized by law * * *. The City derives none of its powers from the United States. It is a creature of the State of Missouri and has only such powers as the state has given it. The relation of the United States to the City is no different than would

be the relation to it of any individual, corporation, foreign state or foreign sovereignty which had made a similar arrangement for financing the City with respect to the construction of public works. If the City could lawfully enter into this agreement with the United States, we think it could lawfully have entered into a similar agreement with any entity having power to contract."

Under the law as declared by the Supreme Court of Missouri, the alleged agreement between the officers of the United States and the officials of the City of Cape Girardeau offered in evidence in this case is worthless.

Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464; 14 S. W. 938.

American Jurisprudence, Volume 18, Section 126, p. 749, states the rule applicable to the facts in this case, as follows:

"A municipal corporation cannot without express authority from the Legislature sell property which it holds for the use and benefit of the public at large."

The Record in this case fully supports the finding of the District Court that the Government officials, in ignoring the decision of the Supreme Court of Missouri in the Painter case, supra, and the rule just stated acted arbitrarily without reasonable regard for the interests of the public at large and especially of the City and County of Cape Girardeau, and that the determination to select the Court House Park as a site for the new Post Office was made without considering the facts and without reference to the information which the investigation, report and recommendations made by the Government's only Site Agent so fully and clearly disclosed.

We believe it has been sufficiently shown by what has already been said herein that the law of the State of Missouri as stated in the Painter case, supra, is the law by which this case was rightly decided by the courts below, and that the action of the Government officers in wholly ignoring the decision in that case is arbitrary, capricious and unreasonable.

We call attention to a few of the decisions of the Courts of the United States which hold that the law of the State should be recognized and followed.

In **Guy v. Utrecht, Warden, 144 F. (2d) 913, l. c. 915,** the Court said:

> "The highest court of a state is the final arbiter of what the state law is, and when that court has spoken, its decision must be accepted by the federal courts as defining the law of the state. **West v. American Telephone & Telegraph Co., 311 U. S. 223, 236, 61 S. Ct. 179, 85 L.Ed. 139, 132 A.L.R. 956; Wichita Royalty Co. v. City National Bank of Wichita Falls, 306 U. S. 103, 107, 59 S. Ct. 420, 83 L.Ed. 515; Herzog v. Colpoys, App. D. C. 143 F. (2d) 137, 138.**"

In **Krauss v. Greenbarg, 137 F. (2d) 569,** the Court of Appeals, Third Circuit, at page 571, said:

> "However, as this Court has said many times since **Erie Railroad Co. vs. Tompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487,** our duty is to apply state law as we find it in the state decisions irrespective of what we may regard as its merits."

In **Charles Payton West and Maurice John West v. American Telephone and Telegraph Co., 311 U. S. 223, l. c. 236, 237,** the Court said:

> "* * * the state 'laws' which, by Sec. 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, chap. 20, 28 U.S.

C.A., Sec. 725, are made 'the rules of decision in trials at common law' define the nature and extent of petitioners' right. See **Russell v. Todd, 309 U. S. 280, 289, 84 L.Ed. 754, 761, 60 S. Ct. 527.** And the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute. **Erie R. Co. v. Tompkins, supra (304 U. S. 78, 82 L.Ed. 1194, 58 S. Ct. 817, 114 A.L.R. 1487).** True, as was intimated in the Erie R. Co. Case (304 U. S. 78), the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See **Wichita Royalty Co. v. City Nat. Bank, 306 U. S. 103, 107, 83 L.Ed. 515, 517, 59 S. Ct. 420.** But the obvious purpose of Sec. 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken."

In **Palmer v. Hoffman, 318 U. S. 109, l. c. 118,** the Court said:

"Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, settles the question of Missouri law prohibiting the City Officials from entering into an agreement with the agents of the Government for an exchange of property. That opinion is printed in the Appendix, pages 12a-18a.

VI.

The rule is also well settled that if the decision of the lower courts was correct the petition for writ of certiorari should be denied, even though the Court below may have based its ruling upon a wrong ground or had not based its ruling on all the facts in the Record which would have justified additional grounds for the decision.

In **North American Acc. Ins. Co. v. Tebbs, 10 Cir., 107 F. (2d) 853, l. c. 856,** the Court of Appeals held:

> "The trial court reached a correct result. The fact that he gave erroneous reasons therefor is immaterial. In the review of judicial proceedings if a decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In **Helvering v. Gowran, 302 U. S. 238, l. c. 245,** the Court said:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In **Reconstruction Finance Corporation v. Goldberg, 143 F. (2d) 752, l. c. 756,** the Court said:

> "Furthermore, even though the Court had relied upon a wrong ground for its judgment, it must be affirmed if correct. **Helvering v. Gowran, 302 U. S. 238, 245, 58 S. Ct. 154, 82 L.Ed. 224; LeTulle v. Schofield, 308 U. S. 415, 421, 60 S. Ct. 313, 84 L.Ed. 355.**"

In **Dr. William Howard Hay Foundation v. Safety Harbor Sanatorium, 145 F. (2d) 661, l. c. 663,** the Court said:

> "The findings positively and definitely decide

against plaintiff all fact issues tendered on the trial, and they fully support the conclusions of law. It is appellant's burden, therefore, to show us that these are clearly erroneous."

In **Westchester County Park Commission v. United States, 143 F. (2d) 688, l. c. 694, 695,** the Court said:

"These rulings, to be sure, occurred in cases not involving condemnation; but that would seem to be a distinction without significance. Even, however, should we disregard those rulings, we would nevertheless conclude that there was no prejudice here. For, as under Rule 81 (a) (7), 28 U.S.C.A., following Section 723c, the new rules of procedure are applicable to appeals in condemnation cases, we must, under Rule 43 (a), apply the more generous rule of evidence; therefore, the federal 'harmless error' statute (28 U.S.C.A. Sec. 391) governs; under that statute the admission of the testimony was surely harmless. **Cf. United States v. Miller, 317 U. S. 369, 375, 63 S. Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55.**

(17) 5. Nothing is left to this appeal but, in effect, a request to us to conduct a trial de novo. This we cannot do. The trial court's determination of the facts must stand unless it is unsupported by substantial evidence. We see no warrant for reversal on that score."

VII.

Government's authority to dispose of present Post Office Building and Site is restricted by Acts of Congress.

It is apparent from the facts in the Record now under consideration that the Government is not auhorized by Section 341 or Section 345b of Title 40 U.S.C., or any other statute to exchange the present Post Office Building and site at Cape Girardeau for the land described in the Condemnation Petition already devoted to public use.

There is no claim by petitioner that the government-owned building and site has been supplanted by a new structure, or that the Secretary of the Treasury has determined there is no further federal need for the present government-owned building and site.

Section 345b, Title 40, provides the only method for disposing of existing federal buildings and it applies only in cases where existing buildings have been supplanted by new structures.

The alleged agreement for such an exchange of property is unauthorized, illegal and void and cannot be effectuated under the guise of a condemnation suit.

Furthermore, it is evident that in the selection of the site in this case, the administrative agents gave no consideration "to the interest and convenience of the public," as requred by Section 254, Title 40, U. S. Code.

VIII.

Petitioner misconceives the effect of the decision of the courts below.

Petitioner (Petition, p. 22, last paragraph) states that "the decision below would seem to require specific selection, by Act of Congress, of each site already put to a public use. Unless Congress is to be left in doubt as to what language, if any, is necessary or will serve to avoid this obviously impractical construction, review by this Court would seem to be essential." The petitioner's criticism of the decisions of the courts below is wholly unwarranted, under the undisputed facts in this Record. The facts are that the courts below followed the unbroken

line of authorities authorizing the courts to review the action of administrative officials in the circumstances here presented.

In order to show that petitioner has misconceived the decision of the courts below, we here quote from the opinion of the District Court (55 F. Supp. 555, 563) (R. 617) showing that the position of petitioner is unfounded. The Court said:

> "Certain conclusions suggest themselves which should be stated. This is not a case, in fact, where the representatives of the plaintiff have gone to the city of Cape Girardeau and designated the most imposing tract of ground in the city from a landscape viewpoint and which is now used as a public park, for the site of the new Federal building. And this notwithstanding the site is not in the trend of business nor accessible except from one street. That while the plaintiff will not take all the park, it will take a sufficient part of the park to destroy its usefulness as a park. That the plaintiff has proceeded to issue an order for the destruction of the public buildings on the site, buildings in which necessary public business is now transacted, including the Court of Common Pleas, Departments of City Government and the storage of valuable records, and granted to another building in which a public library is housed 'thirty days' to vacate. That this action was taken by the Joint Committee, with information in their possession with respect to availability of other sites which shows unquestionably that the action of the plaintiff is unnecessary and the site selected is not now, nor was it when selected, the most desirable and available. If this were the cold record, we believe few would question the conclusion that such action by the Joint Committee was arbitrary and unnecessary.
>
> Nevertheless the conclusions, as outlined above,

are present as a matter of law on the record in this case. The evidence shows that plaintiff was caused to take action which leads to the same results as outlined above, by virtue of the solicitation and entreaty of the city officials of Cape Girardeau, which solicitation crystalized in an agreement between the city officials of the city of Cape Girardeau and the Government officials to trade the park site (described in the petition) for the present Federal building. The city officials of Cape Girardeau, no doubt acting in perfect good faith represented to plaintiff or the Joint Committee on site selection, that the city had a legal right to sell or exchange the park site. Also acting in perfect good faith the officials of plaintiff and the Joint Committee 'relied' upon the representations of the Cape Girardeau city officials as to their legal right to sell or exchange the park site, and the Joint Committee so relying, 'based' their decision as to site selection, upon such erroneous representation. The City of Cape Girardeau being without a legal right to sell or exchange the park property, as held by the Supreme Court of Missouri and in the opinion in this case by the Federal Court of Appeals, leaves the action of the Joint Committee in selecting the park site in the same status, as a matter of law, as if no exchange negotiations had taken place, and the plaintiff's officials had never been induced to consider the site upon the basis of the proposed exchange.

In the case of **Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S. Ct. 364, 81 L.Ed. 510,** the Supreme Court had before it the question of legality of a gas proration order issued by the Railway Commission of Texas, ostensibly for the purpose, among others, of preventing the waste of gas. We think what the Court said with respect to the presumption of the existence of facts justifying the specific exercise of the power there under consideration, applies to the selection of a site for a post office made by and under authority of those agents of the Gov-

ernment to whom such duty has been delegated. Referring to the order in the Thompson case, the Court said, 300 U. S. loc. cit. 69, 57 S. Ct. loc. cit. 371, 81 L.Ed. 510: 'It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise. * * * The plaintiffs have assumed the heavy burden of overcoming the presumption and of establishing that the order is an arbitrary taking of their property.'

A consideration of all the facts justifies the conclusion that defendant (respondent herein) has sustained the burden of proof placed upon her; that the selection of the site described in the petition, under all the facts referred to, amounts in law to an arbitrary and unnecessary act. Plaintiff's second amended petition will be dismissed."

The above quoted language clearly shows that the contention of petitioner (Petition p. 17) that arbitrary or capricious means "bad faith" has no application to the decisions of the courts below, under the undisputed facts in this Record. The courts below expressly held that the question of bad faith did not enter into the consideration of the facts bearing upon the question of arbitrary or capricious action of the administrative agents.

Petitioner asks this Court to grant a writ of certiorari on the grounds that the decision in this case is in conflict with the decision in the C. M. Patten and Company case, whereas an examination of the Patten case discloses that this case is not in conflict with the decision in the Patten case under the conceded facts in this record, but, on the contrary, is in exact accord and harmony with the Patten case.

C. M. Patten and Company v. United States, 9 Cir., 61 F. (2d) 970 (erroneously stated as page 920 in the Opinion

of the Court of Appeals [R. 663]), quotes from **United States v. City of Tiffin, 190 F. 279, 280,** including the following:

> "This does not mean, however, that no power may intervene to prevent arbitrary action, for such power certainly abides in the courts."

The Court [61 F. (2d) l. c. 972] then says:

> "However, this right of the federal government to condemn is subject to the power of courts to intervene and prevent arbitrary and unnecessary action, which must be determined by the facts in each particular case."

The Court (page 972) also says:

> "Recognizing therefore the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved."

The Court (p. 972) then stated the advantages in the selection of the site and said:

> "This conclusion was reached by the trial court and is sustained by the weight of the evidence."

The decision of the Circuit Court of Appeals was correct and is not subject to review when, in approving the findings of the District Court, based upon the evidence in this Record, it said:

> "We cannot say that any of these findings of fact by the District Court are clearly erroneous. On the contrary, each of them was, in our opinion, required by the evidence." (R. 661, 662.) **United States v. Carmack, 151 F. (2d) 881, 882.**

It is conclusively shown from the evidence in this case that the present proceedings for condemnation of the courthouse park site were instituted as a means for accomplishing indirectly an exchange of properties which could not be directly made. [151 F. (2d) 881, l. c. 883.] It also appears in this Record that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property: **Carmack v. United States, 151 F. (2d) 881; Board of Regents of Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938; Mott v. Morris, 249 Mo. 137, 155 S. W. 434.**

The same authorities cited and relied upon by petitioner in this Court are the identical authorities relied upon by petitioner in the courts below. And in this case, the lower court said that the facts in this Record are sufficient to distinguish this case from **C. M. Patten & Co. v. United States, 9 Cir., 61 F. (2d) 970; United States v. Certain Parcels of Land, D. C., 30 F. Supp. 372,** and like decisions.

Counsel for petitioner have not cited any authority justifying the attempt of the city officials of the City of Cape Girardeau to barter and exchange properties under the conceded facts in this case and, in our opinion, none can be found. The entire contention of counsel for petitioner is bottomed upon academic discussion of cases and statutes applicable to the power and authority of the United States to condemn property already devoted to public use under the facts and circumstances set out in the cases cited.

To illustrate, the Court, in the Patten case, said:

> **'Recognizing, therefore, the principle thus stated and applying it to the facts in the present case, we then turn to the evidence to ascertain whether the government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved."**

We have set out (ante. p. 42) what the Court said in the Patten case with respect to the evidence as to the advantages of the site selected. The right of the government to review is unquestioned in any of the authorities and each case must be determined upon its own facts.

Further in the Patten case the Court quoted with approval the following statement of the law bearing on the question of necessity: "However, this right of the federal government to condemn is subject to the power of the courts to intervene and prevent arbitrary and unnecessary action, which must be determined by the facts in each particular case."

In the case under consideration the facts in this Record are, as stated by the lower courts, sufficient to distinguish this case from the cases relied on by counsel for petitioner.

CONCLUSION.

The respondent, by reason of the facts in the Record and the applicable principles of law, believes that the judgment of the court below should be affirmed, and respectfully asks that the Court will so order.

Respectfully submitted,

HOMER HALL,
509 Olive Street, St. Louis 1, Mo.,
ROBT. D. ABBOTT,
506 Olive Street, St. Louis 1, Mo.,
I. R. KELSO,
First National Bank Bldg., Cape Girardeau, Mo.,
L. LEE BOWMAN,
H. & H. Bldg., Cape Girardeau, Mo.,
Counsel for Respondent.

APPENDIX.

(The formal style of case omitted here.)

Washington, D. C.
Tuesday, November 9, 1943.

Stipulation Between the Plaintiff, United States of America, and Defendant, Iska W. Carmack, Regarding an Agreed Statement of Facts to be Read in Evidence on the Part of the Defendant, Iska W. Carmack, in the Above-Entitled Cause.

Without limiting either the right of the defendant, Iska W. Carmack, to take depositions in the above entitled cause, or the scope of the inquiry in the above entitled cause, it is agreed between the plaintiff, United States of America, and Iska W. Carmack, one of the defendants in the above-entitled cause, as follows:

Item I. Agreed Statements of Facts.

That the United States of America, plaintiff, and Iska W. Carmack, one of the defendants in the above-entitled case, admit the statements of facts hereinafter set out, and agree that said statements of facts shall be read in evidence on behalf of the said defendant, Iska W. Carmack, on the trial of a certain cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482 (Condemnation Suit) wherein the said United States of America is plaintiff and the said Iska W. Carmack, is one of the defendants;

That said statements of facts hereinafter set out shall be received in evidence on the trial of said cause, as aforesaid, as agreed statements of facts;

That this stipulation, signed by the parties hereto, shall be filed with the shorthand reporter, spread upon the record, and annexed to the certificate of the said shorthand reporter to be sworn to before a notary public in accordance with certain stipulations between the parties hereto, signed by said parties and filed with the said shorthand reporter, on the ninth day of November, A. D., 1943, and spread upon the record by agreement between said parties hereto, on said ninth day of November, A. D., 1943.

Item II. Description of the Property.

That it is agreed by and between the parties hereto that the property sought to be condemned in the above entitled cause by the United States of America, plaintiff herein, as the site for the construction and maintenance of a Post Office, Custom House, and Federal Court building at Cape Girardeau, Missouri, is located in the town (now City) of Cape Girardeau, Missouri, in the Eastern Judicial District of Missouri, Southeastern Division.

It is further agreed that the property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation, filed in the above-entitled cause, is now and has been for many years, devoted to public purposes (the Common Pleas Court House, City Offices, Public Library, and Public Park);

That Post Office Inspector M. J. Deutsch was designated as the Government's only Site Agent to visit said City of Cape Girardeau, County of Cape Girardeau, and State of Missouri, for the purpose of investigating and recommending to the Joint Committee considering the selection

of the Post Office, Custom House, and Federal Court Building Site at Cape Girardeau, Missouri, an available, suitable, and fitted site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

That said Post Office Inspector, M. J. Deutsch, in fact visited the said City of Cape Girardeau, Missouri, from July 23 to 26, 1940, and from July 29 to 31, 1940, during which time the said Post Office Inspector, M. J. Deutsch, investigated each of the twenty-two (22) parcels submitted in response to the advertisement of the United States of America to submit proposals of sites for inspection.

That the said Post Office Inspector, M. J. Deutsch, did, after considering facts pertinent to the site selection for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, make a report to said Joint Committee considering the selection of said site for the construction and maintenance of a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, wherein said Post Office Inspector, M. J. Deutsch, recommended as his first choice of site other than the public property sought to be condemned in Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause.

That copies of said Site Agent's report, made by said Post Office Inspector M. J. Deutsch, were sent with the letter sent to The Honorable, The Attorney-General of the United States requesting the filing of the Plaintiff's (Second) Amended Petition in Condemnation in the above-entitled cause;

That a copy of said report and recommendation of said Post Office Inspector M. J. Deutsch was sent to Harry C. Blanton, United States Attorney of Eastern Judicial District of Missouri, the attorney of record for the United

States of America, the plaintiff in the above-entitled cause now pending in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482, and said copy of said report of said Site Agent, Post Office Inspector M. J. Deutsch, is now in the custody of said Harry C. Blanton, United States Attorney.

It is further agreed that the property sought to be condemned by the plaintiff, the United States of America, in the above-entitled cause is in the nature of a public park upon which is located a Court House used by the Court of Common Pleas of Cape Girardeau County, a Public Library Building, a bandstand, a memorial monument surrounded by a fountain, and a memorial monument to W. F. D. Bajer, the latter being in front of the library building.

The park upon which these structures are located is used for gatherings of the Boy Scouts, and gatherings of various other groups. It is also used as place for recreation, and is furnished with settees. The library is a public one, used by the public generally. The bandstand is not only used by the band in giving concerts, but is used for public speakings. The second story of the court house is occupied by the Common Pleas Court, a Judge's Chambers, and a law library for the court, the entire second floor being appropriated to the Common Pleas Court service. The first floor is occupied by various city officials, including the city clerk, the clerk of the Court of Common Pleas, the city engineer, the mayor, the city council, and the city attorney. There is a basement in this building used largely for a storage space, in which to keep the files and records of the Court of Common Pleas. The Government seeks to condemn all the property with the improvements thereon except the library building.

[Stipulation contains no Item III.]

Item IV. Public Library and Public Library Building.

It is agreed by and between the parties hereto that there is now and has been for many years past continuously maintained a public library building in which the said City of Cape Girardeau, Missouri, now and for many years past has continuously maintained a public library for the general public, both as a public library and also additionally as a meeting place for civic organizations such as garden clubs, rose societies, historic societies, and other civic and public gatherings.

All of the real estate on which the above-mentioned public library building is located, together with all of the real estate adjacent to said public library building, is included in the description of the property sought to be condemned in the (Second) Amended Petition, in Condemnation, filed by the United States of America, plaintiff, in the above-entitled cause in the United States District Court, Eastern District of Missouri, Southeastern Division, Civil Action, File No. 482, wherein the said Iska W. Carmack is one of the defendants;

That the City of Cape Girardeau, Missouri, will be required to vacate said public library building situated on the said real estate sought to be acquired by the United States of America by condemnation in the above-entitled action upon thirty days' notice by the Government, and, upon notice, to remove said Library and Library Building from Government property within a reasonable time.

The land sought to be condemned was originally conveyed with other land in 1807 by its then owner, Louis Lorimier, to the Board of Commissioners and Assessors for the use of the District of Cape Girardeau. The deed recites that it was executed pursuant to a proposal of the grantor, made on the thirteenth day of January, 1806, to have the Seat of Justice of that District permanently fixed

upon his land at that place. The deed contains provisions in the nature of conditions or limitations that the land so given should "be and remain forever common and public, and never to be appropriated to private use, agreeably to the explicit intention of the donor."

Item V. Facts Regarding the Deeds of 1814 and 1820.

It is agreed by and between the parties hereto that in 1814, the Seat of Justice in the meantime (between 1804 and 1814) been removed from Cape Girardeau to Jackson, the Judges of the Court of Common Pleas in form conveyed this tract to the heirs of Louis Lorimier, and on September 11, 1820, all of the heirs of Louis Lorimier, deceased, conveyed the premises by quit claim deed to the inhabitants of the Town of Cape Girardeau collectively "for their use, benefit and behoof forever."

This deed conveyed certain other property not here involved; and concluded with the following paragraph:

> "Provided always that the several tracts or parcels of land thus granted to the Town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public uses to which they are respectively intended, and that they, nor any part of them, shall never become private property."

That the said defendant, Iska W. Carmack, is one of the direct heirs of Louis Lorimier, deceased, and of Maria Louise Lorimier, Thomas S. Rodney, and Thomas Jefferson Rodney, mentioned in the caption and in paragraph Eleventh, of Plaintiff's said (Second) Amended Petition in condemnation.

That said defendant, Iska W. Carmack, is an inhabitant,

citizen, taxpayer, and owner of lots in and near the said town (now city) of Cape Girardeau, Missouri.

It is further agreed by and between the parties hereto that the acquisition by the Government by condemnation in the Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause will include all property under and immediately adjacent to the Public Library Building.

Item VI. Agreement to Exchange Property.

That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the Old United States Post Office Building located in said City of Cape Girardeau, Missouri;

That said City Officials claimed and represented that they based their authority to sell or dispose property upon Section 7210 and 7211 of the Revised Statutes of Missouri 1929;

That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned is based upon said representations as to the right and authority of the City Officials to sell or dispose property under said Section 7210 and 7211 of the Revised Statutes of Missouri 1929.

Item VII. Harlan Bartholomew.

Several years ago Harlan Bartholomew of St. Louis, Missouri, a city planning expert, made a plan for the City of Cape Girardeau, Missouri.

Item VIII. Architect.

It is agreed by and between the parties hereto that Associate Architect H. A. Tucker had no authority and was given no instructions to examine any sites offered at the City of Cape Girardeau, Missouri, other than the site sought to be condemned, for the Post Office, Custom House, and Federal Court Building, but, acting under instructions dated September 25, 1940, of the said Joint Committee, visited Cape Girardeau between October 1 and October 7, 1940, for the purpose of obtaining such data as necessary to develop studies for utilizing the property sought to be condemned in the Plaintiff's (Second) Amended Petition in Condemnation; and further,

That the said H. A. Tucker had no authority, and was given no instructions to make any investigation of said other sites, and had no authority to make any recommendations to the said Joint Committee regarding the selection of a site for the New Post Office Building, Custom House, and Federal Court Building, at Cape Girardeau, Missouri, and, in fact made none.

Item IX. Liaison Officer.

It is agreed by and between the parties hereto, that H. S. Roome, Liaison Officer of the Federal Works Agency, had no authority, and was given no instructions to inspect any sites offered at the City of Cape Girardeau, Missouri, for the Post Office, Custom House, and Federal Court Building, and made none, but, acting under instructions of the

Federal Works Administrator, dated November 20, 1940, the said Liaison Officer H. S. Roome conferred with City Officials at Cape Girardeau, Missouri, from November 24 to November 29, 1940, inclusive, for the purpose of negotiating a mutually satisfactory proposal to be submitted to the Government by the City Officials of Cape Girardeau, Missouri, for the exchange of the property described in Plaintiff's (Second) Amended Petition in Condemnation filed in the above-entitled cause, for the old Post Office Building and site.

The said Liaison Officer H. S. Roome agreed with the City Officials of Cape Girardeau, Missouri, on the form of proposal to be submitted to the Government for the exchange of property, but made no recommendation regarding the merits of the property sought to be condemned, or any other property as a site for a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri.

Item X. Petitions of Cape Girardeau, Missouri, Citizens and Taxpayers Filed With the Joint Committee.

That it is agreed by and between the parties hereto that John Sample of Cape Girardeau, Missouri, did, on or about November 19, 1940, cause to be filed a petition with the Joint Committee considering the selection of a site for the Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, signed by six hundred and sixty-seven (667) citizens and property owners of said City of Cape Girardeau, Missouri, protesting any action which would result in part of the said park (property sought to be condemned) being used for Federal building purposes.

Item XI. Project Deferred for the Duration.

That it is agreed by and between the parties hereto that the project of constructing a Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, has been deferred for the duration of the War, and the City Officials of the said City of Cape Girardeau, Missouri, were notified of said deferment of said project for the duration on February 19, 1942, by the Administrator of Public Works.

Item XII. Recommendation of the Joint Committee.

That said Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, recommend the acceptance of the City's proposal which had been worked out as to form by the said H. S. Roome, Liaison Officer.

The recommended acceptance of the site sought to be condemned by the Joint Committee was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted to occupy the present Federal Building and site at Cape Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time.

Item XIII. Agreement Does Not Limit Right of Iska W. Carmack to Offer Additional Further Evidence.

It is further agreed by and between the parties hereto that the foregoing statements of facts are to be offered in evidence on the part of the defendant, Iska W. Carmack, on the trial of the above-entitled cause without prejudice to the right of said Iska W. Carmack to offer further and additional and other testimony regarding any or all of the facts herein set out.

The Parties Hereto Stipulate and Agree as set out in the above and foregoing statements of facts, and in witness thereof hereunto set their hands and affix their seals this 9th day of November, A. D., 1943, Washington City, District of Columbia, U. S. A.

UNITED STATES OF AMERICA,
Plaintiff,
By B. J. Hasson, Attorney,
Department of Justice.

ISKA W. CARMACK, Defendant.
By L. Lee Bowman,
Cape Girardeau, Missouri,
and I. R. Kelso, Attorney.
I. R. KELSO,
Offices in the First National
Bank, Cape Girardeau, Missouri.

The foregoing statements approved by:

HARRY J. McNERNEY,
Attorney, Federal Works Agency.

The Opinion of the Supreme Court of the State of Missouri Construing the Deed from the Lorimier Heirs of September 11, 18, 20, Is the Law to Be Applied to the Facts in This Case.

The law to be applied to the facts in this case, is the law of the State of Missouri as declared by the Supreme Court of Missouri with respect to the power of the City to exchange or convey the property here involved. The opinion of the Supreme Court of the State of Missouri construing the deed from the Lorimier heirs of September 11, 1820, relied upon by the United States in this case, is, therefore, for convenience and ease of reference, here printed in full, as follows:

> The Board of Regents for Normal School District No. 3 v. Painter, Appellant, 102 Mo. 464, 14 S. W. 938.

"The plaintiff as a body corporate brought this action of ejectment to recover out lot H in the City of Cape Girardeau. The lot in question is the eighth and last parcel of land described in the following deed, dated the eleventh of September, 1820: 'Be it remembered that the undersigned heirs and legal representatives of Louis Lorimier, deceased, namely, Louis Lorimier, Daniel F. Steinbeck, Victor Lorimier and Thomas S. Rodney as guardian of Thomas Jefferson Rodney and Polly Rodney, for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged and for divers other good considerations and more particularly for the convenience and encouragement of the inhabitants of the town of Cape Girardeau and owners of lots in or near the same, have given, granted, sold, aliened, quitclaimed and conveyed, and they do hereby give, grant, sell, alien, quitclaim, convey and confirm unto the inhabitants of the

town aforesaid collectively, for their use, benefit and behoof forever, the several lots or parcels of land hereinafter described, viz.: First. The place known and designated in the plan of said town as the **Public Square,** bounded * * * as originally laid off and containing four acres. Second. Lot number 22, in range C, bounded * * * including a spring. Third. Lot number 22, in range A, bounded * * *. Fourth. All the vacant space between the river Mississippi and the front of ranges A, B, G and H, designated on the map by the name of Front Street or Aquamsi; **and generally all the ground appropriated to streets and alleys throughout the whole town, as represented in the plan thereof.** Fifth. The space on the river above the town, in front of out lot number 1, containing two acres and half more or less. Sixth. A hundred feet square in out lot number 2 and adjoining North Street, so as to afford a convenient access to the spring used in that part and to include said spring. Seventh. Six acres of land (as laid off in the map of out lots) situated part in out lot number 2 and part in out lot number 32 and now used as a graveyard; with the condition that the western half thereof shall be and remain appropriated to the Roman Catholic Church. Eighth. An out lot marked h containing about three acres and a quarter, bounded eastwardly by Pacific Street and westwardly by John Scripp's purchase of six acres, on the north by out lot g and on the south by out lot i, which lot, including a large spring, is destined for the establishment of a public school. Together with all and singular the right, title, * * *; provided always that the several tracts or parcels of land granted to the town of Cape Girardeau and the citizens thereof shall remain forever affected and appropriated to the public use to which they are respectfully intended, and that they, or any part of them, shall never become private property. In testimony whereof, etc.'

The plaintiff put in evidence the foregoing deed, and an ordinance of the City of Cape Girardeau, approved the twenty-fourth of September, 1873, which provided: "That the Mayor of the City of Cape Girardeau be and he is hereby authorized to offer to donate to the regents of the Southeast Missouri Normal School said described lot as an additional inducement to locate said school in said city, and he is authorized to make a deed to said regents of said normal school under the seal of said city, turning over, confirming and quitclaiming all right of the city to said lot to said regents of said school for said purpose, always provided said Southeast Missouri Normal School shall be located in the City of Cape Girardeau and which said lot may be sold and disposed of as the said regents may see proper, to further the erection of the buildings necessary for said school within said city.'

Also a deed dated November 13, 1873, executed pursuant to said ordinance, and purporting to convey lot H to the regents of the Southeast Missouri Normal School.

The plaintiff produced further evidence to the effect that the school was located in the City of Cape Girardeau in 1872 or 1873. The same evidence shows that the building was not located on the lot in question, but in another and different part of the city. **Mr. Painter, the defendant, testified on the part of the plaintiff that he had been in possession of the lot for about ten years, that he made no claim of title to the premises and that they were of the rental value of three dollars per acre per annum. This was all the evidence produced, and on it the Court gave judgment for the plaintiff.**

The defendant objected to the deed from the City of Cape Girardeau to plaintiff, assigning as a reason therefor,

that, under the terms of the deed from the Lorimier heirs to the inhabitants of the town, the present City of Cape Girardeau had no power to convey the premises to the plaintiff and that the deed was therefore void. This objection was overruled, both when the deed was offered in evidence and again by instructions given and refused. If the objection is well taken it disposes of this appeal.

The deed from the Lorimier heirs was made, it will be seen, in 1820. It may be that the town of Cape Girardeau had then been incorporated under territorial laws, but there is no evidence upon that subject in the Record. We are not even informed by the Record or Briefs when or by what law the present City of Cape Girardeau was incorporated. We shall, however, assume that it is an incorporated city with the usual governmental powers and that it has power to hold real property and to sell the same when not dedicated to some particular use. Again the defendant in his Brief says he is defending this case in the interest of the local public schools, but we find nothing to that effect in the pleadings or in the evidence. In short the case is before us on a very unsatisfactory Record.

The owner of lands may devote and dedicate them to public use; and it is now well settled law that a dedication of lands to public use does not require the existence of a corporation in which to vest the title. Such a dedication will be valid without any specific grantee in existence at the time the dedication is made. The public is an ever-existing grantee, capable of taking a dedication for public uses. Rutherford v. Taylor, 38 Mo. 317; Trustees v. Council of Hoboken, 33 N. J. L. 16. **The deed of the Lorimier heirs may, therefore, have full force and effect as a dedication of the various parcels of land therein**

described to public use, though the inhabitants of the town were not at the date thereof incorporated.

The Lorimier heirs by their deed conveyed the various parcels of land 'to the inhabitants of the town aforesaid collectively, for their use, benefit and behoof forever'; and of the particular lot now in question the deed says, 'which lot including a large spring is destined for the establishment of a public school'. There is the further clause to the effect that the several parcels of land 'shall remain forever affected and appropriated to the public uses' to which they are devoted, and shall 'never become private property'.

It is clear from these clauses of the deed that the donors intended that this lot should be forever used by the inhabitants of the town for the establishment of a public school; that the lot itself should stand affected with and appropriated to that use, and that it should never become private property. **Conceding that the present City of Cape Girardeau has invested in it as a corporation the right and power to manage and control this property, still it does not follow that it has the power to alien or convey the same. With the concession just made the city is but a trustee to manage the property for the uses and purposes to which it was devoted by the donors. It may control and regulate the use of the property, but it has no right to devote the same to private uses, or even to public uses different from those specified in the deed.** Cummings v. The City of St. Louis, 90 Mo. 259. Where land has been dedicated to specific limited and defined purposes, the subject of the grant cannot be used for another and a different purpose. Price v. Thompson, 48 Mo. 361, citing with approval Warren v. The Mayor of Lyons City, 22 Iowa 351.

But the plaintiff insists that the city by conveying this property to the plaintiff is carrying out the very purposes for which the lot was set apart by the Lorimier deed, and that the normal school is a public school within the meaning of that deed.

This normal school was established under the act of March 22, 1873 (Acts of 1873, p. 79), and is conducted under the provisions of article 3 of chapter 150, Revised Statutes, 1879. It is one of the three normal schools established in this state, the state being divided into three districts for such purposes. Section 7167 provides that the Board of Regents shall require applicants for admission to sign and file with the secretary of the board a declaration of intention to follow the business of teaching in the public schools of the state. These schools, it will be seen, were established for the primary purpose of trainin and educating school teachers. While they are supported, in the main, from the public treasury and are part of the school system of this state, still we think it is clear they are not public schools within the meaning of the Lorimier deed. The grantors therein say they made it "more particularly for the convenience and encouragement of the inhabitants of the town of Cape Girardeau and of the owners of lots in and near the same".

The donors did not set this lot apart for the benefit of a few persons who might elect to follow a particular calling, but they intend it to be appropriated to a school which would be open to all, regardless of any declared intention to follow a particular avocation. That a school established in conformity with the Lorimier deed may be under the control of the laws concerning public schools we have no doubt; but we are also of the opinion that the donors used the words 'public school' in a general and popular sense, and by it they meant a school which would be open to all

of the inhabitants of the town. This being so the city had no right or power to convey the lot to the plaintiff. It could no more convey the lot to plaintiff than it could the other parcel called a public square. As said in Trustees v. Council of Hoboken, supra, when speaking of the powers of local authorities: 'They cannot sell the lands so dedicated, nor release nor extinguish the use for which they were dedicated, nor employ them in any way variant from the purposes for which they were designed'.

Our conclusion is that the deed from the city to the plaintiff was an effort on the part of the city to devote this property to purposes other and different from that contemplated by the donors, and that the deed is worthless and conveyed nothing. The city has no power to donate this property to plaintiff. The judgment is, therefore, simply reversed. All concur." (Emphasis added.)

Protest of the County Court of Cape Girardeau County Against Disposition of Court House Park Site and Building.

"State of Missouri,
County of Cape Girardeau.—ss.:
November Term, 1940.

In the County Court of said County on the 25th day of November, 1940, the following, among other proceedings, were had, viz.:

In Re: Disposition of Cape Girardeau Court of Common Pleas, for U. S. Post Office site—
Resolution.

Whereas, on this the 25th day of November, 1940, it being the fourth day of the November term of said Court, the following resolution is hereby adopted, to-wit:

Whereas, at all times since the organization of the Cape Girardeau Court of Common Pleas, the courthouse and facilities for the use of said court have, in the major part, been provided by Cape Girardeau County, Missouri, said county having in 1887 and 1888 provided for about nine-tenths of the expense of enlarging and improving the courthouse as it now stands, and all subsequent maintenance expenses including street improvements, and the furnishings and equipment for said courthouse have been in the major part paid by this county up to the present time, with only a minor part of any of said expenses having ever been paid by the city of Cape Girardeau, and this county has, therefore, in the course of time become financially interested to a substantial extent in said courthouse building and the various furnishings, equipment and improvements thereof; and

Whereas, this County Court of said county has become advised of a proposal for said courthouse, thus furnished and improved, to be disposed of by the Mayor and Council of the City of Cape Girardeau without any consultation with this County Court and without any recognition of the interest of this county therein;

Now, Therefore, in consideration of the premises and of the public and the financial interest which this county has in said courthouse building and the furnishings, improvements and equipments thereof, this County Court does protest against any such disposition of the same without recognition of the rights and interests of the county therein and without consultation with this Court as the official representative of said County.

State of Missouri,

County of Cape Girardeau.—ss.:

I, Louis H. Schrader, Clerk of the County Court, in and for said County, hereby certify the above and foregoing to be a true copy of the proceedings of our said County Court, on the day and year above written, as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in Jackson, Missouri, this the 18th day of April, 1944.

(Seal)

LOUIS H. SCHRADER,
Clerk of the County Court,
Cape Girardeau County, Missouri."

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JAN 20 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 40

UNITED STATES OF AMERICA, PETITIONER,

v.

ISKA W. CARMACK, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S PETITION FOR REHEARING.

HOMER HALL,
509 Olive Street,
St. Louis 1, Mo.,

ROBT. D. ABBOTT,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 40

UNITED STATES OF AMERICA, PETITIONER,

v.

ISKA W. CARMACK, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S PETITION FOR REHEARING.

The respondent prays the Court for a rehearing of this cause for the reason that the Court overlooked questions which are decisive of the cause and which were duly submitted by counsel for respondent.

I.

Matters decided by the lower courts based upon the Stipulation of Agreed Facts and which are decisive of this cause were overlooked by the court.

(a) The Stipulation of Agreed Facts, which is binding upon the petitioner, and the undisputed evidence in this case, which were overlooked by this court, show that the

proceedings in question were for the purpose of effecting an exchange of properties. These decisive facts and the undisputed evidence fully support the conclusions of the lower courts and the contentions of respondent and are fully stated in the opinion of the district court (R. 600-618) reported in 55 F. Supp. 555, from which we quote.

The district court (R. 608, 55 F. Supp. 555, l. c. 559) states:

"Defendant's Exhibit A is a stipulation of agreed facts entered into between the plaintiff and the defendant, Iska W. Carmack, since the first trial. This stipulation was entered into in Washington and introduced in evidence in this case in its entirety. The stipulation is approved by Harry L. McNerney, Attorney for the Federal Works Agency. Mr. McNerney was called as a witness in this case by the plaintiff. He stated he was Special Assistant General Counsel for the Federal Works Agency, and assisted in preparing defendant's Exhibit A. Referring to the contents of Exhibit A and that Exhibit A *sets forth the basis upon which the selection of the site was made in this case* this witness testified:

"'*It is my understanding that the chronological statement given to Judge Kelso contained all of the important items* pertaining to the final selection of the *New Custom House and Court House and Post Office site* in Cape Girardeau; but the stipulation was prepared in first form by Judge Kelso and agreed to by Mr. Hasson representing the Department of Justice, and myself, based on what he had presented to us as embodying points he was to bring out, as were related in the chronological statement.

"The Court: *Were there material matters before the Department on which they based a decision, that are not in that agreed statement of facts or stipulation?*

"A. *Not to my knowledge.*

"The Court: Is it your knowledge from an examination of the files in the department with which you are connected that *this stipulation* that you entered into *covers material facts upon which the Department based its decision?* (Our emphasis here.)

"A. That is right.' (Emphasis added.)

"The Stipulation states that Mr. Deutsch was the only Site Agent to visit the city of Cape Girardeau for the purpose of making a recommendation to the Joint Committee considering selection of the Federal Building site. After detailing the manner of Mr. Deutsch making his investigation, the Stipulation recites that—

"'Post Office Inspector, M. J. Deutsch, recommended as his first choice a site other than the public property sought to be condemned in plaintiff's second amended petition.'

"The Stipulation sets forth the facts regarding the public use of the park site and the facts regarding the chain of title by virtue of which the site is now used as a public park, and the conditions contained in the deed of dedication to the inhabitants of the City.

"The Stipulation refers to the 'agreement for exchange of property' between the city and the plaintiff, and then states that—

"'*The agreement between the city officials of the city of Cape Girardeau and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned*' (emphasis added) is based upon representations and claims by the city officials of the city of Cape Girardeau *that they had power to make the exchange.*

"The Stipulation concludes with this significant paragraph:

"'The said Joint Committee considering the selection of site for Post Office, Custom House and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, *recommend the acceptance of the City's proposal which has been worked out as to form by the said H. S. Roome, Liaison Officer.*

"*The recommended acceptance* of the site sought to be condemned by the Joint Committee *was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted* to occupy

the present Federal Building and site at Cape Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

"*The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that* the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time.' (Emphasis added.)

"We conclude from this record that the plaintiff concedes in this case that the selection of the site described in the petition, '*was on the basis of exchange of the present Federal Building and site thereof*' for the city park site described in the petition, *as the result of the agreement between the City Officials* and the plaintiff. In doing this did the Joint Committee base their act on a false premise, namely: a mistake of law; the law governing the right of the city to sell or exchange the whole or any part of the park site? 'Item VI' of the Agreed Statement of Facts reads as follows:

"'Item VI. Agreement to Exchange Property.'

That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the Old United States Post Office Building located in said City of Cape Girardeau, Missouri;

"That said City Officials claimed and represented that they based their authority to sell or dispose property upon Section 7210 and 7211 of the Revised Statutes of Missouri, 1929; That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the Old Post Office Building and site for the property sought to be condemned *is based upon said representations* as to the right and

authority of the City Officials to sell or dispose property under said Section 7210 and 7211 of the Revised Statutes of Missouri 1929.' (Emphasis added.)

"The decision of the Court of Appeals in this case[1] states:

" 'The record shows without dispute that the property (described in the petition) has been devoted to public use, *not* alone *because the owners chose to do so, but* because they *were required by the deed of dedication so to do.* There was a *legal obligation* to *maintain the property* for the *designated public purpose.*' (Emphasis added.) (Our emphasis added.)

" 'This obligation rests upon the city officials. The lack of power on the part of the City to sell or exchange the property in question has been passed on by the Supreme Court of Missouri. See Board of Regents, et al. vs. Painter, 102 Mo. 464. The Supreme Court of Missouri was passing upon the right of the city to dispose of a parcel of the same land, described in the deed by which the park was conveyed and dedicated to Public use. In part, the Court said:

" 'This being so the city had *no right or power to convey* the lot to the plaintiff. It could no more convey the lot to plaintiff than it could the other parcel called a public square.' The 'public square' referred to in the Supreme Court opinion is land part of which is described in the petition. The use of the 'public square' for a Post Office and Federal Court Building, which would destroy the practical use of the public square, is as much a departure from the public use for which the property was dedicated, as in the case passed upon by the Supreme Court of Missouri. (Emphasis ours.)

"The City of Cape Girardeau being without legal right to sell or exchange any part of the park property and having a legal obligation to maintain the property for the designated public purpose set out in the instrument of conveyance, by virtue of which it now occupies the site, we *can not*

[1]Carmack vs. United States, 135 F. 2d 196, first appeal.

conclude other than that this proceeding was filed in aid of and had as its primary object the execution of the agreement made by the city officials to exchange the park property for the present Federal Building, and that the Joint Committee in designating the park site and in turn submitting its selection to the Postmaster General and Director of Federal Public Works, proceeded and acted under a mistake of law as to the right of the City to sell or exchange the land known as the City Park. Had the lawful rights of the city officials of Cape Girardeau been correctly understood by the Joint Committee (that they were without a legal right to sell or exchange the park property) the site would not have been selected, in the opinion of this Court. (Our emphasis.)

"Mr. Tucker, Architect for the Public Building Administration, sent to Cape Girardeau to investigate the park site, made this recommendation:

" 'If the city officials *can legally trade* their *publicly-owned Court House Park site for the present Post Office building and land,* I recommend it be accepted, *and if that is not legally possible, I then recommend the Post Office be sold to the city and land purchased in some other location for the new Federal building.*' (Emphasis added) (Our emphasis added.)

"We find in the Deutsch report a like statement as representing the judgment of the Postmaster at Cape Girardeau. *Nowhere in the record is there any mention of an intention to take the park site, except by agreement with the city.* (Emphasis ours.)

"There is *another point in the record that we think worthy of note,* from which it appears that the City Officials acted on a mistaken assumption—one of fact. *Defendant offered in evidence the deposition of Harlan Bartholomew. Mr. Bartholomew's business is civic engineer and city planner of wide experience, having taken* part in development of civic plans in over sixty American cities, including Washington, Pittsburgh, St. Louis, Los Angeles. Mr. Bartholomew was employed by the Chamber of Commerce of the city of Cape Girardeau to prepare a 'civic plan' for the city of Cape Girardeau. In part it will be found attached

to plaintiff's Exhibit 16. H. Arthur Tucker, in September of 1940, visited Cape Girardeau for the purpose of investigating 'conditions on and around the so-called Court house site, *which has been offered in exchange for the present owned Federal property*, for use as a site for the proposed Post Office and Court House Building.' Mr. Tucker's Report is United States Exhibit 16. This report contains this paragraph regarding the objective of the city officials of Cape Girardeau, with reference to the Bartholomew plan and the new Federal Building.

"'The above-mentioned city officials favored any scheme developed by the Government in locating this new Post Office and Court House *which would be in accordance with* and also which would expedite the commencement of proposed Civic Center.' (Emphasis added.)

"On this subject Mr. Tucker concludes as follows:

"'Because the proposed new Federal Building without doubt, will be the largest and most imposing building to be built in this Civic Center (referring to the Bartholomew plans) it seems obvious that it should be the building erected on the most prominent site of the plan. With the present city-owned park site therefor established as the most prominent feature or focus of the Civic Center, it leaves only the exact location of a building on that site to be determined.'

"On the other hand Mr. Bartholomew, originator of the Civic plan, testified on location of the new Federal Building on the Court House park, as follows:

"'I would say that it is unfortunate—most unfortunate.'

"*We believe the action of the Joint Committee, in the proceeding under a mistake of law, is decisive of this case adverse to the plaintiff, but we do not base our holding on that point alone.*" (Emphasis ours.)

(b) The opinion of the Circuit Court of Appeals (R. 655), 151 F(2d) 881, clearly states the chief issue involved in this case under the undisputed facts which are decisive of the case and which were overlooked by the court in its decision. The matters which were overlooked by the court

were duly submitted by the respondent. In referring to the issues and the undisputed facts of this case, which this court overlooked in deciding the case, the Circuit Court of Appeals (R. 655, 657. 151 F(2d) 881, 882) said:

"The District Court found on substantial evidence that the taking by the Government of that part of the park sought to be condemned *would result in the destruction of the use of the remainder of the tract as a park;* would require the wrecking of the common pleas court building and the removal of the public library building and a public monument; and would materially interfere with the proceedings of the court of common pleas and with the transaction of city business in the courthouse building, and also with the plans for a civic center prepared by an expert employed by the local chamber of commerce for that purpose. The court also found that there was no necessity for the taking of the land described in the petition for condemnation; that other sites in the City of Cape Girardeau were available for the proposed Federal project; that the failure to secure the land in this proceeding would not result in the failure of the Federal project; *and that the park was not selected by the Federal Works Administration and the Postmaster General as a site for the Federal building upon considerations of Federal necessity or advantage, but because of the erroneous belief of these Federal agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated.* (Emphasis ours.)

"We cannot say that any of *these findings of fact* by the District Court are clearly erroneous. On the contrary, *each of them was, in our opinion, required by the evidence.* *****. (Emphasis ours.)

"The evidence also established that, prior to the institution of the condemnation proceedings, certain agents of the Public Works Administrator and officers of Cape Girardeau had conceived the idea of an exchange of the park property for the present Federal building and the land on which it is situated, and that negotiations between them to that end had culminated in the proposed agreement between them for

the *exchange of property*. As stated above, this proposed agreement was *the moving cause* for the selection of the park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted *as a means for accomplishing indirectly an exchange of properties which* could not be directly made. *This exchange* was to be consummated eventually by the acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings. The facts set out above are sufficient, we think, to distinguish this case from C. M. Patten & Co. v. United States, 9 Cir., 61 F. 2d 920; United States v. Certain Parcels of Land, D. C., 30 F. Supp. 372, and like decisions.

"******* We think it may not be said that Congress in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States for postoffices, courthouses, and customhouses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, *but also held in trust for the specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions.*" (Emphasis ours.)

(c) The above-quoted portions of the opinions of the courts below, stating the undisputed evidence which supports the conclusions reached by the lower courts and the contentions of respondent, would seem to render unnecessary the repetition of that evidence and argument in support of this point of respondent's petition for rehearing.

However, counsel deem it proper to call attention to the following propositions which were duly presented by re-

spondent in her brief and are supported by the evidence which shows that a trade of properties was to be effected, but that neither the government officials nor the citizens of Cape Girardeau knew that the public library building and site were to be involved in the proposed trade.

(1) Mr. Meyers, the Fourth Assistant Postmaster General, testified:

"Q. Do you know whether the original plan for the condemnation of a part of the park and courthouse contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site" (R. 137) (Br. 6).

Louis Hecht, a prominent merchant on Main Street at Cape Girardeau, and the owner of some ten store buildings on Main Street, in referring to the condemnation of the Library site and building, testified, in part, as follows:

"Q. When did you first learn from any source that the Public Library Building was included in this condemnation?

A. When I first learned that the library is included in the condemnation proceedings?

Q. Yes, sir.

A. I never knew that the library was included. I have always been under the impression that if the postoffice is located where the courthouse is now that it would not affect the library, that the library would not be affected in any way, it would be left as it is" (R. 249).

(2) The record in this case shows that the citizens of Cape Girardeau were in large numbers opposed to the proposed trade even though they were not informed that the library building was to be included.

In the Report and Recommendations of *M. J. Deutsch*, the Government's only Site Agent (R. 167-204), it is stated:

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. The President of

the Chamber of Commerce decided not to give an opinion as to his preference."

The record shows that 5,755 votes were cast at the general Municipal Election held April 2, 1940.

And the court, referring to the referendum petition signed by the citizens of Cape Girardeau, protesting against an exchange of properties, said "it was agreed by Counsel it was signed by 2200 people, subject to correction" (R. 466). The Court further said: "We note there was offered in evidence the proceeding leading up to and the holding of an election on the park site. The evidence is of little value to the issues. Only one site was submitted to the voters and that was presented as a question of the city making the trade discussed heretofore. Such procedure could not give legal effect to a transaction the city was powerless to perform" (R. 616).

The files of City of Cape Girardeau relating to ordinances and contracts for the exchange of property were not open to the public. Relating to this matter (R. 451), Mr. Kaempfer, the City Clerk, testified that since this proceeding to exchange property, or this ordinance, to exchange property down to that time, none of the papers relating to this condemnation suit or the exchange of the property, was to be found in his office. They are all in the hands of the City Attorney, in his files. One of the attorneys for the defendant Carmack repeatedly urged him to get the files so they would be available in the preparation of this case, but he didn't have the files, and they had not been back in his custody.

(3) The court has overlooked the evident fact that the citizens of Cape Girardeau who might have indicated their approval of the proposed exchange of properties were not informed and did not know that the city officials had no right or authority to trade the land occupied by the courthouse and library and used as a public park, which lack of power and authority is clearly stated in Ark-Mo Power Co. v. City of Kennett, Mo., 78 F. (2d) 911, and Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, which are cited and discussed in respondent's brief (Br. 50, 51).

(4) The court has also overlooked the evident fact that the citizens of Cape Girardeau who may have indicated approval of the proposed trade of properties were not advised and did not know that the government's agents did not have authority under the Acts of Congress to trade the present postoffice building and site for the land occupied by the courthouse of the State of Missouri and the public library established and maintained by the citizens of Cape Girardeau. This proposition was duly presented by respondent in her brief (Br. 55) as follows:

"It is apparent from the facts in the Record now under consideration that the Government is not authorized by Section 341 or Section 345b of Title 40 U. S. C., or any other statute to exchange the present Post Office Building and site at Cape Girardeau for the land described in the Condemnation Petition already devoted to public use.

There is no claim by petitioner that the government-owned building and site has been supplanted by a new structure, or that the Secretary of the Treasury has determined there is no further federal need for the present government-owned building and site.

Section 345b, Title 40, provides the only method for disposing of existing federal buildings and it applies only in cases where existing buildings have been supplanted by new structures.

The alleged agreement for such an exchange of property is unauthorized, illegal and void and cannot be effectuated under the guise of a condemnation suit.

Furthermore, it is evident that in the selection of the site in this case, the administrative agents gave no consideration "to the interest and convenience of the public," as required by Section 254, Title 40, U.S. Code."

The facts in this record above referred to under this point and the Federal statutes cited are decisive of the issue adverse to petitioner. All of said matters hereinabove referred to were overlooked by the court in deciding this cause and were duly presented by respondent.

(5) The record in this proceeding shows that petitioner held a deed from the City to the site described in the petition prior to and at the time of the institution of these proceedings.

The letter from Attorney General to the U. S. Attorney directing commencement of this proceeding (R. 91, 92), clearly shows that this proceeding was not intended to be instituted, and was not instituted, as a proceeding in condemnation under any statute or law authorizing the acquisition of property under the circumstances and facts disclosed by the record but was instituted in an attempt to effect an exchange of properties prohibited by law. The Attorney General under date of October 16, 1941, to the U. S. Attorney in St. Louis, Mo., said:

"There are transmitted herewith a certified copy of a letter dated September 25, 1941, in which the Acting Administrator of the Federal Works Agency requests the institution of a proceeding to condemn land for a post office and custom house site at Cape Girardeau, Missouri, *a deed from the City of Cape Girardeau*, Missouri, purporting to convey title to the land to the United States, ***." (R. 91)

"It is contemplated that compensation for the taking of the land shall be made by conveyance of the present federal building to the City of Cape Girardeau, ***. After judicial determination of the just compensation in the proceeding, *a deed conveying the present federal building site to the city will be obtained and forwarded to you.*" (R. 92, 93) (Emphasis ours)

Letter of John N. Edy, Acting Administrator to the Attorney General, under date of September 25, 1941, requested institution of this suit to effect the illegal contract with city of Cape Girardeau (R. 58). The first clause of said letter to the Attorney General after reciting the statutes applicable to condemnation proceedings contains this significant statement regarding the reason for the institution of this proceeding, to-wit:

"*Under authority of the above cited legislation this Agency entered into a contract with the City of Cape Girardeau, Missouri, for the exchange of the present Fed-*

eral building and site, hereinafter described, for a tract of land as a new Post Office and Custom House site also hereinafter described." (Emphasis ours)

The stipulation of Agreed Facts, Item VI, Agreement to Exchange Property (R. 162) Resp. Bf. App. p. 7a) entered into on November 9th, 1943, after the first decision of the Circuit Court of Appeals on April 26th, 1943, by the United States of America and the respondent, shows that there was an agreement between the city officials and the United States for the exchange of the old post office building and site for the property described as the Court House Park, the alleged agreement to exchange properties being based upon Sections 7210 and 7211, Revised Statutes of Missouri, 1929, which statutes do not give the city officials the authority they represented that they had.

II.

And for further ground for rehearing the respondent says that the court overlooked the following points which were duly presented by respondent and which are decisive of this case.

(a) The consent of the State of Missouri to the acquisition by the United States of this land for the purpose of establishing and maintaining a custom-house and court house has not been given and such consent is necessary and jurisdictional.

Prior to 1929 the laws of Missouri gave consent of the State to the purchase by the United States of land situated in any of the towns or cities of this state not exceeding one acre in quantity in any one lot or parcel on which to erect buildings for the accommodation of United States Courts, customhouses and postoffices. The practice has been to grant the consent of the state by an act of the legislature naming the town and the amount of ground to be selected. To illustrate, the law authorized the acquisition of a site at Hannibal as follows: "The consent of the State of Missouri is hereby given to the purchase by the United States of one or more pieces of land situated in the city of Han-

nibal and in any city or town in this state, not exceeding five acres in quantity, on which to erect a building for the accommodation of the U. S. Court, Postoffice * * * " (R. S. 1909, Sec. 7928).

In 1929 (Laws of Missouri 1929, p. 129) the legislature of Missouri repealed the statutes authorizing the acquisition of property by the United States for the purpose of establishing custom houses and United States courts. From 1929 until the commencement of this proceeding the law of Missouri (now Sec. 12691, Revised Statutes of Missouri 1939) governing this proceeding reads as follows:

"*Section 12691. Consent of state given United States to acquire Missouri land for certain purposes.*—The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

Under the law of Missouri since 1929 down to the date of commencement of this proceeding the United States Government had no authority to acquire by purchase or grant land for the purpose of establishing and maintaining court buildings or custom houses, as it claims in this proceeding and as it attempted to do by omitting from its amended petition the allegation that the site sought to be acquired was to be for a court house and custom house.

(b) Pleadings involved in this proceeding relating to acquisition of property by the United States in the state of Missouri, show that the proceeding is in conflict with the Constitution of the United States and the Laws of Missouri.

Original Petition (R. 5, Clause fourth) reads as follows: "Fourth: The land sought to be condemned herein has

been duly selected as the new *Post Office and Custom House and Court House site.* * * *"

The Answer to Original Petition (R. 473, 474), in the second paragraph, reads as follows: "Further answering this defendant says that the Legislature of the State of Missouri has not given its consent to the condemnation of said property for the purposes stated in plaintiff's petition or for any other purpose as is required by law when public property is sought to be condemned for other public purposes."

While it is clear that the United States government has had no authority to acquire by purchase or grant any land in this state for the purpose of establishing and maintaining customhouses and courthouses since 1929, yet the statutes above referred to were not made the basis of the decision of the lower courts. The chief issue in this cause which was overlooked by this court is the issue expressly decided by the Circuit Court of Appeals when it held that "* * * the present proceedings for condemnation of the site were instituted as a means for accomplishing an exchange of properties which could not be directly made * * *" and that "* * * the park was not selected by the Federal Works Administrator and the Postmaster General as a site for the Federal building upon considerations of Federal necessity or advantage, but because of the erroneous belief of these Federal agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated."

III.

And for further ground for rehearing, the respondent says that she is entitled to a reconsideration of this cause for the reason that in deciding said cause the court overlooked the following points which are decisive of this cause adverse to the petitioner and which were duly submitted by counsel for respondent.

(a) The petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, does not challenge the findings of facts and decisions thereon adverse to petitioner. In support of the above petition respondent submits that petitioner is limited to the questions presented on petition for writ of certiorari to the Circuit Court of Appeals. Upon the record in this proceeding the following conceded facts which were overlooked in deciding this cause are decisive of the issues in this case adversely to petitioner.

(1) The letter of the Attorney General to the U. S. Attorney at St. Louis states: "You are advised that the Solicitor General has decided that application should not be made for a writ of certiorari." (R. 94)

That letter shows that the Attorney General based his request for the filing of the amended petition in this proceeding upon one issue, namely, the obtaining of a judicial review of the asserted capricious or arbitrary action of the officer who selected the park site.

The petitioner accepted the findings of facts and the decision of the Circuit Court of Appeals holding that "The record shows without dispute that the property has been devoted to public use, not alone because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose." (Carmack v. United States, 135 F2d 196, l. c. 199).

By reason of the failure of petitioner to make application for a writ of certiorari (R. 94), the petitioner accepted that as the law appplicable to this proceeding.

(2) This court in deciding this case has overlooked the decisive fact, as held by the Circuit Court of Appeals, that joint action by the Federal Works Administrator and the Postmaster General was necessary to the institution of these proceedings.

The Court of Appeals held: "Before the Administrator of the Federal Works Agency had authority under the law to direct the institution of this proceeding, the selection of the site and the designation of the town for the erection of a post office building must first have been determined by the

joint action of the Postmaster General and the Administrator of Federal Works Agency. This, we think, was jurisdictional, and there is neither allegation nor proof of the required joint action. As this question goes to the jurisdiction of the court to hear and determine the condemnation proceeding and it appears on the face of the record, we must notice it even though, as contended by counsel for appellee, the question had not been timely presented in the trial court." (Carmack v. United States, 135 F2d 196, l. c. 201.)

The joint action of the Federal Works Administrator and the Postmaster General (petitioner's exhibit 4) was not in compliance with the law requiring such action to be taken prior to the institution of the proceeding. There is nothing in the record to show that either the Federal Works Administrator or the Postmaster General did anything other than to merely sign the paper showing joint selection in 1943. There is no evidence to show that the certificate of selection was made as required by statute prior to the institution of this proceeding but on the contrary it clearly appears that the record does show that it was a certificate of selection as of that date in 1943 and not evidence of a joint selection made prior to the institution of proceeding as required by statute, which the court held to be, and which was, a jurisdiction requirement.

(3) The petitioner ignored and the court, in deciding this case, overlooked the undisputed facts contained in the report of M. J. Deutsch the government's only site agent.

In referring to the Deutsch report, the Circuit Court of Appeals said:

"Without quoting the Deutsch Report in full, in part it refers to the "Disadvantages" of the Park site here in issue as follows: 'This location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of future business expansion or growth. A new building here would face a side street with only fair residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it may

be necessary to forego advantages, with respect to necessary approaches and drive-ways." (R. 604)

The Deutsch Report recommending the "First Choice," which the court overlooked, reads as follows: "This is an excellent corner location facing the most prominent intersection in the city and on the principal business street. The center of the business section is not definitely ascertainable because of the diversion caused by the three business sections, but this corner is generally regarded as being the center of the business district. This location is about two blocks north and three blocks east of what might be designated as the center of delivery and the approximate center of population. *** Regardless of the fact that the trend of the business district is toward the west on Broadway, this would remain the principal and the most prominent intersection because of the character of the buildings now standing."

The District Court found that: "The reason for the 'Joint Committee' rejecting the recommendation of their site agent appears first in the Deutsch Report: 'An important advantage is that the exchange herein provided for (of Park site from the city for the present Federal Building) will allow the Government to dispose of the present federal building and site to a mutual advantage. No other acceptable offer for an exchange or sale of the present government property is securable.'" (R. 606)

The Deutsch report ignored by petitioner and overlooked by the Court in this proceeding closes with this recommendation: "First Choice: *** This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would present an advantageous or desirable transaction."

For second choice the site agent said: "I have selected Site No. 1, the city owned park, which could be developed into an attractive setting for the new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. *** The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled

by friendly condemnation proceedings as the city officials are willing and desirous for the trade."

Wherefore, the respondent, by reason of the grounds stated in this petition for rehearing, is entitled to a reconsideration of this cause and respectfully asks that the court will so order.

Respectfully submitted,

HOMER HALL,
ROBERT D. ABBOTT,
I. R. KELSO,
L. LEE BOWMAN,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

We, the undersigned counsel for respondent, state that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Dated in St. Louis, Missouri on January 16, 1947.

Signed:

Homer Hall,

Robert D. Abbott,

I. R. Kelso.

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1946.

United States of America, Petitioner, v. Iska W. Carmack.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 9, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

This proceeding was instituted by the United States to condemn land as a site for a post office and customhouse in the City of Cape Girardeau, Missouri, in reliance upon several federal statutes, including the general Condemnation Act of August 1, 1888, and the Public Buildings Act of May 25, 1926.[1] The City and site were selected by the Federal Works Administrator and the Postmaster General acting

[1] ". . . , in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, ..." Sec. 1, Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. § 257.

"To enable the Federal Works Administrator to provide suitable accommodations . . . for courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Federal Works Agency in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, . . . *Provided*, That . . . insofar as relates to buildings to be used in whole or in part for post office purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: . . . ." 40 U. S. C. § 341. This is codified from § 1 of the

jointly under the Public Buildings Act. The principal issue is: Was the Federal Works Administrator authorized by the foregoing statutes to acquire by condemnation land held in trust and used by the City for such public purposes as those of a local park, courthouse, city hall and public library?

In 1941, the United States petitioned the United States District Court for the Eastern District of Missouri to condemn as a site for a United States post office and customhouse about one and one-half acres, near the center of the City of Cape Girardeau, together with the improvements thereon except a public library building. This site was part of a four acre public park and the improvements to be condemned included a building used as the county courthouse and city hall, a memorial fountain, a small memorial monument and a portion of a bandstand. The library building apparently was to be removed by its owners on 30 days' notice from the United States.

The petition included as parties defendant the City and County, numerous officials, and all known and unknown heirs or others who might claim an interest in this site especially through those who conveyed it, in trust, in 1807 to the Commissioners of the District or, in trust, in 1820 to the inhabitants of the Town of Cape Girardeau. Respondent was the only defendant to file an answer. Finding that she had no interest permitting her to maintain the

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Public Buildings Act of May 25, 1926, 44 Stat. 630–631, as modified by Reorganization Plan I, §§ 301–303, 53 Stat. 1426–1427, 5 U. S. C. following § 133t. See also, 40 U. S. C. §§ 342–350 and the balance of the original Act.

The petition likewise relied upon the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. §§ 258a–258e; Third Deficiency Appropriation Act, fiscal year 1937, 50 Stat. 755, 773; Federal Public Buildings Appropriation Act of 1938, 52 Stat. 818; and the Reorganization Act of 1939, 53 Stat. 561, 5 U. S. C. § 133, *et seq.*, under which Reorganization Plan I was submitted to Congress and made effective July 1, 1939, 53 Stat. 813, 5 U. S. C. § 133s.

defenses she asserted, the District Court entered a preliminary decree in favor of the United States. On respondent's appeal the Circuit Court of Appeals remanded the cause for further proceedings consistent with its opinion holding that the respondent had a special interest entitling her to object to the property being taken for a purpose destructive of the public use to which it had been dedicated by her ancestors. *Carmack* v. *United States*, 135 F. 2d 196.

In 1944, on retrial before a different judge, the District Court recognized the respondent as entitled to contest the condemnation and, at the direction of the Circuit Court of Appeals, heard evidence as to whether or not the officials of the United States acted capriciously and arbitrarily in selecting this site. It held that "the selection of the site described in the petition, under all the facts referred to, amounts in law to an arbitrary and unnecessary act" and dismissed the petition. *United States* v. *Certain Land, Etc.*, 55 F. Supp. 555, 564. The Circuit Court of Appeals affirmed the judgment on the ground that the Federal Works Administrator and the Postmaster General did not have sufficient statutory authority "to take the particular land sought to be condemned." It then expressly found it unnecessary to consider whether or not the federal officials had acted "capriciously and arbitrarily." *United States* v. *Carmack*, 151 F. 2d 881, 882. Because of the importance of the construction of the statutes authorizing the condemnation of land for federal uses, we granted certiorari. — U. S. —.[2]

[2] The right of the respondent to contest the condemnation turns upon the effect of the deeds, executed by certain of her ancestors in 1807 and 1820, pursuant to which this site long has been put to local public use. Her interest, turning largely on Missouri law, was upheld by the Circuit Court of Appeals, following the first trial, *Carmack* v. *United States*, 135 F. 2d 196, and, as we do not have to question that interest in order to reach our decision, we do not reexamine it. *Bd. of*

Both the general Condemnation Act and the Public Buildings Act [3] expressly authorized the acquisition of land by the United States by condemnation as a site for a United States post office, customhouse or courthouse. Neither Act expressly named the City or designated the site to be condemned in this case. Neither expressly stated whether or not sites already in use for conflicting federal, state or local public purposes were subject to condemnation. The Condemnation Act supplemented the federal right "to procure real estate for the erection of a public building or for other public uses," by adding to it a general federal power of condemnation under judicial process to be exercised by an officer of the Government "whenever in his opinion it is necessary or advantageous to the Government to do so." The Public Buildings Act, as an incident to an original $150,000,000 program, gave authority and direction to the Secretary of the Treasury (later substituting the Federal Works Administrator) "to acquire, by purchase, condemnation, or otherwise, such sites . . . as he may deem necessary, ..." It specified that as to "buildings to be used in whole or in part for post office purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: . . . ." [4] These Acts were natural means for Congress to adopt in putting its constitutional powers into use on a scale commensurate with the size of the nation and the need of the time. Neither Act imposed

Regents, Normal School Dist. No. 3 v. *Painter*, 102 Mo. 464, 14 S. W. 938; *Mott* v. *Morris*, 249 Mo. 137, 155 S. W. 434; and 25 Stat. 357, 40 U. S. C. § 258. The proceeding to condemn the land being *in rem*, the jurisdiction of the court does not turn upon her participation in the case. Cf. *United States* v. *Dunnington*, 146 U. S. 338, 352; *In re Condemnation Suits by United States*, 234 F. 443, 445.

[3] See note 1, *supra*.

[4] For the three foregoing quotations, see note 1, *supra*.

expressly any limitations upon the authority of the officials designated by Congress to exercise its power of condemnation in procuring sites for public buildings deemed necessary by such officials to enable the Government to perform certain specified functions.[5] Far removed from the time and circumstances that led to the enactment of these statutes in 1888 and 1926, this Court must be slow to read into them today unexpressed limitations restricting the authority of the very officials named in the Acts as the ones upon whom Congress chose to rely

The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. The Fifth Amendment, in turn, provides him with important protection against abuse of the power of eminent domain by the Federal Government.[6]

While in its early days the Federal Government filed its condemnation cases in the state courts, this Court, in *Kohl v. United States*, 91 U. S. 367, disposed of the idea that this was necessary. In that case, which has become the leading case on the federal power of eminent domain, Mr. Justice Strong also said:

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[5] Nothing has been found in the legislative history of these Acts to indicate that Congress intended to give its agents less than the fullest possible authority of Congress in selecting cities and sites. See H. R. Rep. No. 132, especially minority views at pp. 6–7, 10, and H. R. Rep. No. 1223, 69th Cong., 1st Sess.; S. Rep. No. 197, 69th Cong., 1st Sess.; 67 Cong. Rec. 4023–4028, 8356–8357, 8359, 8494, 8567.

[6] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const. Amend. V.

"It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, *or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed.* The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, *or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.* No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. . . . But *it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and com-*

plete as is the power of the States over the subjects to which their sovereignty extends. . . .

"If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment." (Italics supplied.) *Kohl* v. *United States, supra*, 371–372, 374.

The *Kohl* case approved the condemnation of privately owned land, then subject to a perpetual leasehold, for a post office site in Cincinnati, Ohio, under an Act of Congress expressly naming that City but not expressly naming the site. The respondent here seeks, by judicial interpretation of the general Condemnation Act and the Public Buildings Act, to exclude from condemnation a particular site in Cape Girardeau selected for a post office by the appropriate federal officials. She depends upon the fact that the site already is being used by a governmental subdivision of Missouri for other public purposes impressed upon it by its private owners over a century ago. The principle of federal supremacy, so well expressed in the *Kohl* case, argues against such a subordination of the decisions of federal representatives to those of individual grantors or local officials as to the means of carrying out an admittedly federal governmental function.[7]

It makes little difference that the site here sought to be condemned is held by the City in trust instead of in fee. The city government is not resisting the condemnation. The Federal Government can obtain, by voluntary conveyance, whatever title the City can convey. The weakness in the City's right to sell or exchange this site arises from restrictions in the conveyance to it. Through the

[7] See also, *Hanson Co.* v. *United States*, 261 U. S. 581, 587, for emphasis on the all-inclusiveness of the general Condemnation Act of August 1, 1888.

inclusion, as defendants, of all claimants who might rely upon such restrictions or might claim an interest through the grantors of this site, a decree of condemnation will dispose of the suggested defects. By giving notice to all claimants to a disputed title, condemnation proceedings provide a judicial process for securing better title against all the world than may be obtained by voluntary conveyance.

Both in themselves and from the relation of these Acts to the Constitution, we find substantial reason for making their broad language effective to its full constitutional limit. While the federal power of eminent domain is limited to taking property for federal public uses, the question of the existence of a federal public use presents no difficulty here because the constitutional power of Congress to establish post offices is express.[8]

The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land[9] make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, be equally supreme. Mr. Justice Bradley stated this principle clearly, while on circuit, in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19:

> "The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should

[8] U. S. Const. Art. I, § 8, Cls. 7 and 18.
[9] U. S. Const. Art. VI.

have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes." [10]

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[10] An appeal in *Stockton* v. *Baltimore & N. Y. R. Co.*, *supra*, was dismissed in this Court, 140 U. S. 699, and, in the meantime, Mr. Justice Bradley's statement was quoted with approval in *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641, 656. See also, *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 681; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529–530.

When Congress has wished to subordinate its selection of state lands to state approval it has done so by express provision. In the Weeks Forestry Act of March 1, 1911, 36 Stat. 961, 962; 43 Stat. 1215; 45 Stat. 1010; 48 Stat. 955; 16 U. S. C. § 516, and the Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222, 1223; 16 U. S. C. § 715f, the consent of the state legislature to the federal acquisition of land is made an express condition of the acceptance of such land. Such consent does not deprive the state of civil or criminal jurisdiction over the land. 36 Stat. 963, 16 U. S. C. § 480, and 45 Stat. 1224, 16 U. S. C. § 715g. See also, The Upper Mississippi River Wild Life and Fish Refuge Act of June 7, 1924, 43 Stat. 650, 16 U. S. C. § 724.

The acquisition of federal legislative jurisdiction, as distinguished from federal title to the land, is a different matter. If the Federal Government desires exclusive legislative jurisdiction over land acquired by it, the Constitution indicates that the consent of the state in which the land is located is necessary. Art. I, § 8, Cl. 17, provides that "The Congress shall have Power . . . To exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . ." See *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 18, appeal dismissed, 140 U. S. 699. See also, Joint Resolution of September 11, 1841, 5 Stat. 468, and Rev. Stat. § 355, which formerly required the consent of state legislatures to federal purchases of certain sites as a condition of expending federal funds to pay for them. Since February 1, 1940, such consent has not been required except where

The Fifth Amendment to the Constitution says "nor shall private property be taken for public use, without just compensation." This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power.[11] It imposes on the Federal Government the obligation to pay just compensation when it takes another's property for public use in accordance with the federal sovereign power to appropriate it. Accordingly, when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned.[12]

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the United States has sought "exclusive or partial" legislative jurisdiction. Unless and until the United States accepts such jurisdiction over lands acquired since February 1, 1940, it is presumed conclusively that no such jurisdiction has been accepted. 54 Stat. 19; 54 Stat. 1083; 40 U. S. C. § 255. The exercise of exclusive legislative jurisdiction is not an issue in this case and, in any event, Missouri has consented to it. "The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, . . ." Mo. R. S. A. (1939), § 12691.

[11] See *United States* v. *Cooper*, 20 D. C. 104, 116, affirmed sub nom., *Shoemaker* v. *United States*, 147 U. S. 282; *In re Rugheimer*, 36 F. 369, 371.

[12] When, however, a sovereign state transfers its own public property from one governmental use to another, or when the Federal Government takes property from state ownership merely so as to put it to a federal public use for which the state already holds it in trust, a like obligation does not arise to pay just compensation for it. See *In re Certain Land in Lawrence*, 119 F. 453; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19, appeal dismissed, 140 U. S. 699.

The foregoing establishes the principle of the supremacy of a federal public use over all other uses in a clearly designated field such as that of establishing post offices. The Government here contends that the officials designated by Congress have been authorized by Congress to use their best judgment in selecting post office sites. It contends also that if the officials so designated have used such judgment, in good faith, in selecting the proposed park site in spite of its conflicting local public uses, the Federal Works Administrator has express authority to direct the condemnation of that site. We agree with those contentions. We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected. The judgment exercised by the designated officials in selecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and legislative decision not subject to judicial review on its merits. It was within the legislative power of Congress to choose or reject this site by direct action. It would have been within its legislative power to exclude from the consideration of its representatives this or other sites, the selection of which might interfere with local governmental functions. Such an exclusion would have been an act of legislative policy. We find no such express or necessarily implied exclusion in the broad language of these Acts.[13]

[13] In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed

In this case, it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so "capriciously and arbitrarily" that their action was without adequate determining principle or was unreasoned.[14] The record presents no such issue here. The procedure followed in making the selection of the site showed extraordinary effort to arrive at a fair and reasoned conclusion.[15] The site inspector, in his original

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or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority. See *United States* v. *Jotham Bixby Co.*, 55 F. 2d 317, 319, affirmed sub nom., *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, decree vacated as moot, 289 U. S. 705; *In re Condemnations for Improvement of Rouge River*, 266 F. 105; *United States* v. *City of Tiffin*, 190 F. 279, 281.

[14] "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944), as "1. . . .; without adequate determining principle; . . ." and by Webster's New International Dictionary, 2d Ed. (1945), as "2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned; . . . ."

"Capricious" is defined by Webster's New International Dictionary, 2d Ed. (1945), as "2. . . .; apt to change suddenly; freakish; whimsical; humorsome." Cf. *Fox Film Corp.* v. *Trumbull*, 7 F. 2d 715, 727; *Puget Sound Power & L. Co.* v. *Public Utility Dist. No. 1*, 123 F. 2d 286, 290, cert. denied, 315 U. S. 814; *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315, 319.

See also, *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 379; *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721.

[15] It apparently followed regulations of the Federal Works Agency and Post Office Department as authorized by 5 U. S. C. §§ 22, 369; 40 U. S. C. §§ 341, 347. Among its principal steps were the following: June 12, 1940, approval of the general project for Cape Girardeau by Federal Works Administrator and Acting Postmaster General based upon the recommendation of the Commissioner of Public Buildings and the Fourth Assistant Postmaster General; July 23–26, 29–31, 1940, Post Office Inspector and Site Agent visited Cape Girardeau; August

report, recommended the park site as his second choice and demonstrated the reasonableness of a choice, by his

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20, 1940, he submitted his recommendations, showing that he inspected 22 proposals, eliminated all but 6 on general grounds, carefully considered the remainder and submitted full report on 3. His first choice was to enlarge the present post office site; his second, to acquire the site here in controversy; his third, to acquire a site between the two. Further studies were made in Cape Girardeau or in Washington by the Associate Architect for the Federal Works Agency, the Fiscal Manager of the Public Buildings Administration and the Superintendent of the Division of Post Office Quarters in the Post Office Department. All wishing to be heard were heard. February 11, 1941, the City Council passed an ordinance proposing an exchange of the park site for the present post office site and submitting this proposal to a special election. March 4, 1941, a majority of those voting in 8 of the 10 wards approved the exchange, the city wide vote being 1612 to 1344. May 26, 1941, the Acting Commissioner of Public Buildings notified the Mayor of the Government's acceptance of the proposed exchange. September 25, 1941, the Acting Administrator of the Federal Works Agency advised the Attorney General that, under authority of the Public Buildings Act, the Agency had contracted for the exchange. After referring to his failure to secure title by voluntary conveyance from the City in spite of the willingness of the City officials to make the exchange if they had legal authority to do so, he asked the Attorney General to file this condemnation proceeding. It was done November 22, 1941. In accordance with the opinion of the Circuit Court of Appeals after the first trial, the Government, on June 10, 1943, secured evidence of a formal joint action, signed personally by the Federal Works Administrator and the Postmaster General, expressly selecting the site in suit. This was included in the record of the second trial. The actions of June 12, 1940, and June 10, 1943, refer to the project as one for a post office and courthouse, whereas the petition for condemnation refers to it as one for a post office and customhouse. This variation was not pressed in the litigation and is not material to the main issue of statutory construction.

The foregoing narration of the steps taken in this instance is not intended as an indication that all or any of them are essential to the exercise of the statutory authority to select sites in other cases. They are set forth to help demonstrate that, in the face of them, the selection here cannot be classed as "capricious and arbitrary," under any appropriate definition of those words.

superiors, of either of his first two selections.[16] His estimate of divided community sentiment, with apparent community preference for the park site, indicates the absence of capriciousness and arbitrariness in the Government's final selection of the park site.[17] The popular

[16] "For First Choice I recommend that the present government-owned site be retained and that the adjoining property, Site 2 offered by H. Bermermann be purchased for $15,000, and that a counter offer be made to the owner of Site 3, Ella M. Drum to purchase this site for $600.

"This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction.

"For Second Choice I have selected Site No. 1, the city-owned park, which could be developed into an attractive setting for the new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. The bid submitted by the City is not intended to be a final offer, and it is expected that after a review of the facts by the Site Committee a counter-offer could be made with respect to a definite area of about 175' x 215' within the park grounds and with respect to improvements in surrounding approaches, removal of trees and fountain, and demolition of present city building. The mayor and city council verbally agreed to favor any reasonable counter-offer to be made by the Government. It is my opinion that the government-owned site is valued at approximately $225 per front foot, whereas the park site has a value of about $100 per front foot, and this must be taken into consideration in submitting a counter-offer. The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade."

[17] ". . . the city park property, is actively favored by the City Council, and almost unanimously favored by the business men on Main Street. . . .

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. . . .

"The postmaster, who has no financial or personal interest in any of the locations, but who is conscientiously interested in civic development, regards the government-owned site as an outstanding location

referendum vote of 1612 to 1344 in favor of the transfer of the park site by the City to the Federal Government, in exchange for the Government's transfer of its present post office site to the City, confirms his estimate. These federal officials had the right, if not the obligation, to consider at this time the necessity of disposing of the present post office site and of the single purpose governmental building thereon. That issue inevitably would confront the Government at some time if a new site were chosen. The opportunity to exchange or sell the present site to the City in connection with the acquisition of the park site for a new post office was, therefore, a reasonable rather than a capricious consideration.

On the present record, the petitioner was entitled to a preliminary judgment of condemnation. The finding of the District Court on the second trial that the selection of the park site "amounts in law to an arbitrary and unnecessary act" appears, from the context, to have been a finding largely of the comparative undesirability and lack of necessity for the selection of that site and not to have been a finding that the selection had been made without adequate determining principle and without reason.[18]

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but recommends the city park as first choice because this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings."

[18] The District Court said:

"The right of plaintiff to condemn the land must stand or fall on the determination by this court of the question, Did the Acting Administrator of Federal Works Agency and the Postmaster General, under the circumstances here presented, act arbitrarily and capriciously in selecting the site—*was the act necessary?* The term 'arbitrarily and capriciously' has been defined to mean an act done 'without adequate determining principle; not founded in the nature of things; not done or acting according to reason or judgment'; *an unnecessary act.* . . .

"That this action was taken by the Joint Committee, with information in their possession with respect to availability of other sites

The comparative desirability and necessity for the site were matters for legislative or administrative determination rather than for a judicial finding.[19] Even if the word "arbitrary", as used by the District Court, was intended by it to have the ordinary meaning which that word has when used alone, we are unable to conclude on the record before us that the selection of the park site for a post office in Cape Girardeau was, as a matter of law, capricious and arbitrary in any sense that, under any construction of the Acts before us, would invalidate the selection here made.

The judgment of the Circuit Court of Appeals, therefore, is reversed and the cause remanded to the District Court for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS concurs in the result and substantially agrees with the opinion of the Court. But he reserves judgment as to the circumstances under which authority to condemn land owned by a city or a state should be inferred from a general condemnation statute, if the local government challenged the taking.

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which shows unquestionably that the action of the plaintiff is *unnecessary and the site selected is not now, nor was it when selected, the most desirable and available.*" (Italics supplied.) *United States* v. *Certain Land, Etc.*, 55 F. Supp. 555, 557, 563.

[19] *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 708–710; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Sears* v. *City of Akron*, 246 U. S. 242, 251; *Adirondack Ry.* v. *New York State*, 176 U. S. 335, 349; *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Boom Co.* v. *Patterson*, 98 U. S. 403, 406. See also: "The federal statute . . . does not require proof of 'necessity,' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." *United States* v. *State of Montana*, 134 F. 2d 194, 197, cert. denied, 319 U. S. 772.